SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965/1966

No. ~~383~~ 12

SANDRA LEE NEELY, ETC., PETITIONER,

vs.

MARTIN K. EBY CONSTRUCTION CO., INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

INDEX

RECORD PRESS, PRINTERS, NEW YORK, N. Y., DECEMBER 7, 1965

[fol. 1]

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 7796

MARTIN K. EBY CONSTRUCTION CO., INC.,
a foreign corporation, Appellant,

vs.

SANDRA LEE NEELY, by her legal representative and guardian, CECILE V. NEELY, Appellee.

STATEMENT OF POINTS RELIED UPON BY APPELLANT

Filed June 17, 1964

The following points are relied upon by Appellant in connection with this proceeding:

1. The United States District Court erred in submitting the issue of proximate cause to the jury, since appellee failed to establish by a preponderance of the evidence or otherwise the proximate cause of the accident in question.

2. The United States District Court erred in submitting the issue of appellant's alleged negligence to the jury, since appellee failed to establish by a preponderance of the evidence either that appellant was negligent or that said alleged negligence was the proximate cause of the accident in question.

3. The United States District Court erred in instructing the jury that the appellant owed appellee's decedent the duty to provide him a reasonably safe and adequate platform, since appellant did not owe decedent such duty.

4. Appellee's decedent was guilty of contributory negligence or assumption or risk as a matter of law; therefore, appellee was not entitled to recover.

5. The United States District Court erred in denying appellant's Motion for Involuntary Dismissal made at the close of appellant's case, in denying appellant's Motion for [fol. 2] Directed Verdict made at the close of the evidence; and in denying appellant's Motion for Judgment Notwithstanding the Verdict made following reception of the verdict.

McComb, Zarlengo and Mott, By John C. Mott, Attorneys for Appellant.

[fol. 3]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

No. 7699, Civil.

SANDRA LEE NEELY, by her legal representative and guardian, CECILE V. NEELY, Plaintiff,

vs.

MARTIN K. EBY CONSTRUCTION CO., INC., a foreign corporation, Defendant.

AMENDED COMPLAINT FOR DAMAGES—
Tendered December 31, 1963

Comes Now The plaintiff by her attorneys and for a claim against the defendant avers and alleges:

1. The plaintiff Sandra Lee Neely was born on October 11, 1960, Cecile V. Neely is custodian and legal guardian of the said Sandra Lee Neely by order of Court.

2. The plaintiff Sandra Lee Neely is the only child of Gary Neely who was killed on August 3, 1961, while working at Missile Silo #2, Complex 2-C near Elizabeth, Colorado.

3. The plaintiff is a citizen and resident of the State of Missouri. The defendant is a corporation organized under the laws of the State of Kansas and having its principal place of business in the State of Kansas but doing business also in the State of Colorado. The matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000.00.

[fol. 4] 4. The death of the plaintiff's father, Gary Neely, was a direct result of the carelessness and negligence of the defendant and of its employees who were then and there acting in the scope and course of their employment in the erection, maintenance, and supervision of a certain scaffold.

5. As a direct result of the death of her father, the plaintiff Sandra Lee Neely, being dependent upon him for support and maintenance, has suffered pecuniary losses in the sum of $100,000.00.

Wherefore the plaintiff Sandra Lee Neely acting through her legal guardian and custodian Cecile V. Neely, prays damages against the defendant in the sum of $100,000.00 plus costs, interest, expert witness fees and for such other and further relief as to the Court may seem appropriate.

Kenneth N. Kripke, One of the Attorneys for Plaintiff.

IN THE UNITED STATES DISTRICT COURT

ANSWER

Comes Now the defendant above named by its attorneys, McComb, Zarlengo and Mott, and for Answer to plaintiff's Complaint hereinbefore filed, admits, denies, and alleges as follows:

For A First Defense

1. Admits that Gary Neely was killed August 3, 1961, while working on or about Missile Silo No. 2, Complex 2-C, near Elizabeth, Colorado.

2. Admits the allegations contained in paragraph 3 of plaintiff's Complaint.

3. Denies each and every other allegation contained in plaintiff's Complaint.

For A Second Defense

That the accident, injuries and damages of which the plaintiff complains and alleges were proximately caused by [fol. 5] the sole negligence of Gary Neely, deceased.

For A Third Defense

That the accident, injuries and damages of which the plaintiff complains and alleges were proximately caused by the contributory negligence of Gary Neely, deceased.

For A Fourth Defense

That the damages of which the plaintiff complains and alleges were the result of an unavoidable accident.

For A Fifth Defense

That the accident, injuries and damages of which the plaintiff complains and alleges were proximately caused by the negligence of other persons, firms or corporations, for which the defendant is in no way liable or responsible.

For A Sixth Defense

That the accident, injuries and death of which the plaintiff complains arose out of and in the course of the employment of plaintiff's decedent (Gary Neely) by Sverdrup & Parcel; that at the time of said accident and death plaintiff's decedent and his said employer were subject to the provisions of the Workmen's Compensation Act of Missouri; that Globe Indemnity Company was and is the compensation insurance carrier for Gary Neely's employer, and was and is liable, and has assumed liability for payment of compensation and death benefits in accordance with the Workmen's Compensation Act of Missouri; that said Globe Indemnity Company has paid compensation as was due under said Act; that said Globe Indemnity Company is therefore the owner or part owner of the claim plaintiff asserts in this case and therefore should be a party plaintiff.

Wherefore, having answered, defendant prays that plaintiff's Complaint be dismissed with prejudice, that defendant be awarded its costs expended herein, and such other and further relief as to the Court may seem equitable in the premises.

McComb, Zarlengo and Mott, by John C. Mott, Attorneys for the Defendant.

Defendant Demands Trial By Jury.

Filed November 23, 1962.

[fol. 6]

IN THE UNITED STATES DISTRICT COURT

JUDGMENT ON VERDICT FOR PLAINTIFF—
Entered January 22, 1964

This Action Came On for trial on January 20, 1964 before the Court and a jury, the Honorable Alfred A. Arraj, Chief Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict in favor of the plaintiff, it is

Ordered, Adjudged and Decreed that the plaintiff, Sandra Lee Neely, by her legal representative and guardian, Cecile V. Neely, recover of the defendant, Martin K. Eby Construction Co., Inc. the sum of $25,000.00 with interest thereon at the rate of 6 per cent per annum as provided by law from August 17, 1962.

Further Ordered That plaintiff, above-named, have and recover from the above-named defendant her costs upon the filing of a Bill of Costs.

Dated At Denver, Colorado this 22nd day of January, 1964.

By The Court: Alfred A. Arraj, Chief Judge United States District Court

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IN THE UNITED STATES DISTRICT COURT

MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR FOR NEW TRIAL—Filed January 23, 1964

Comes Now the defendant above named, by its attorneys, McComb, Zarlengo and Mott, and moves this Court as follows:

I. This defendant moves the Court to enter an Order herein setting aside the verdict of the jury entered in favor of the plaintiff and against the defendant, and to enter

judgment in favor of the defendant, in accordance with its motion for involuntary dismissal and/or directed verdict made at the close of plaintiff's case, and in accordance with its motion for directed verdict made at the close of all the evidence.

II. If the foregoing motions be denied, then this defendant moves the Court for an Order granting a new trial herein, and as grounds therefor, defendant alleges as follows:

[fol. 7] 1. The Court erred in refusing to give to the jury Instructions 1 through 4 inclusive, which were tendered by this defendant and refused by the Court.

2. The Court erred in giving any instructions to the jury except an instruction for directed verdict, since the Court should have directed a verdict in favor of this defendant.

3. The Court erred in instructing the jury, over the objection of this defendant, that the defendant had a duty toward plaintiff's decedent to exercise reasonable care to construct a platform which was reasonably safe and adequate to accomplish the purposes for which it was built in the light of all the facts and circumstances as shown by the evidence in the case, when in law and in fact defendant owed no duty whatsoever to plaintiff's decedent.

4. The Court erred in refusing to grant this defendant's motion for mistrial made immediately following an answer given by the witness Fred Blanchard as to his opinion about the platform and scaffold upon which plaintiff's decedent was standing shortly before his death. The question asked of said witness was whether or not he had an opinion, and the question specifically asked for a "yes" or "no" answer, despite which said witness proceeded to advance his opinion.

5. The Court erred in denying defendant's motion for involuntary dismissal and/or directed verdict made at the

close of plaintiff's evidence, and in denying defendant's motion for directed verdict at the close of all the evidence.

6. The evidence is insufficient to sustain the verdict of the jury.

7. The verdict of the jury is contrary to the law.

8. The verdict of the jury is contrary to the evidence.

Wherefore, defendant prays that the Court enter an Order herein setting aside the verdict of the jury and directing a verdict in favor of the defendant, or in the alternative, that this Court enter an Order granting a new trial in this action.

McComb, Zarlengo and Mott, By John C. Mott, Attorneys for Defendant.

[fol. 8]

IN THE UNITED STATES DISTRICT COURT

ORDER DENYING MOTION FOR JUDGMENT NOTWITHSTANDING VERDICT OR FOR NEW TRIAL—February 27, 1964

This Cause came on to be heard on motion of the defendant for judgment notwithstanding the verdict or for new trial, and the Court having examined the file and heard arguments of counsel for both parties, and now being fully advised, orders that the motion for judgment notwithstanding the verdict and the motion for new trial shall be and hereby are denied.

Dated this 27th day of February, 1964.

Alfred A. Arraj, United States District Judge

IN THE UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed March 20, 1964

Notice Is Given that the above named petitioner, Martin K. Eby Construction Co., Inc. hereby appeals to the United States Court of Appeals for the Tenth Circuit from a judgment which was entered January 22, 1964 in favor of the plaintiff and against petitioner, and from an Order which was entered February 27, 1964, denying petitioner's Motion for Judgment Notwithstanding the Verdict and petitioner's Motion for New Trial.

Dated this 19 day of March, A.D., 1964.

McComb, Zarlengo and Mott, By John C. Mott, Attorneys for the Appellant

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[By order of April 21, 1964, the time for docketing the cause in the Court of Appeals was extended to June 18, 1964.]

[A supersedeas bond was filed March 20, 1964.]

[fol. 9] **Official Transcript**

Proceedings before the Honorable Alfred A. Arraj, Chief Judge, United States District Court for the District of Colorado, and a Jury of Six, in Courtroom A, Main Post Office Building, Denver, Colorado, beginning at 9:30 o'clock a.m., on the 20th day of January, 1964.

* * * * * * *

DEFENDANT'S OPENING STATEMENT

Mr. Mott: Ladies and gentlemen, as you have already been told, my name is John Mott, and I am representing the defendant, Martin K. Eby Construction Company, in this case.

I am sure the Court will instruct you at a later part of these proceedings that what is said during the opening

statement, of course, is not evidence, but merely a brief outline by the lawyers as to what some of the evidence will be, and, of course, the case is to be decided on what you hear from the witness stand and from such exhibits and so forth as may be introduced and received into evidence.

Now, of course, there is no question, ladies and gentlemen, but that the accident did happen on August 3, 1961, out there at the missile silo east of Denver, and that Mr. Neely fell from this platform that Mr. Kripke mentioned a considerable distance, some 100 feet I believe or more, to his death.

There is no question, of course, but that the Eby Company was a subcontractor out there for the Martin Company, and there is no question but that the platform that Mr. Kripke is talking about was put there by the Eby Company in the manner in which you will hear from the evidence.

The evidence will be, ladies and gentlemen, that what was there at the time of the accident was open, obvious and well known to everybody and that although Mr.—I think Mr. Wilhoit, and as I recall maybe one other person had already negotiated this step over from the scaffold or platform to the counterweight, that instead of putting his foot on the I-beam like Mr. Wilhoit did, I believe Mr. Kripke mentioned that, I think, the evidence will be that Mr. Neely put his foot on something else there and it didn't hold him and he did fall.

[fol. 10] Of course, the evidence will be that what he did put his foot on was not in any way the responsibility of the Eby Company. They had nothing to do with it.

The evidence will also be that this distance between the counterweight and the platform that we are talking about was not a very great distance. There was a change in elevations and that all of these things were known to Mr. Neely before he stepped out there and that if he did use

no due care when he made this step, of course, that's contributory negligence and he wouldn't be able to recover, nor his daughter, in this case, but the principal evidence will be the Eby Company had nothing whatsoever to do with this accident. The accident was not caused by anything they failed to do or anything they actually did before the accident, and, therefore, at the close of the evidence we are going to ask you for a verdict in favor of the Eby Company absolving them of all liability for this very unfortunate accident.

Thank you very much.

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In Open Court

(A jury of six was duly selected and impaneled.)

(Mr. Kripke and Mr. Mott made opening statements to the Jury.)

FRED P. BLANCHARD called as a witness by the plaintiff, being first duly sworn, on his oath testified as follows:

Direct examination.

By Mr. Kripke:

Q. What is your name, please?
A. Fred P. Blanchard.
Q. What is your address?
A. Hazelwood, Missouri.
Q. Your occupation?
A. Engineer.
Q. And you have come to Colorado in this case to testify at my request, is that right?
A. That's correct.
Q. By whom are you employed?
A. By the company of Sverdrup & Parcel and Associates, Inc., engineers and architects.

[fol. 11] Q. Maybe we better speak up a little louder so the Jury can hear. For how long have you been employed by them?

A. Since August of 1956.

Q. And in what capacity?

A. As a senior engineer in charge of design and preparation of design plans.

Q. Did you know Gary Lee Neely?

A. I had a working acquaintance with Mr. Neely, Yes.

Q. Do you know how long he was employed by the same company?

A. At the time I was employed by Sverdrup & Parcel, Mr. Neely was working summers. He was working on his degree at Washington University.

Q. He had not yet graduated?

A. He had not yet graduated.

Q. Did he continue to work with S & P right through this period?

A. He had a short time of military service in connection with his ROTC. Other than that he worked for Sverdrup & Parcel.

Q. Were you employed by S & P on August 3, 1961?

A. Yes, sir.

Q. In what capacity?

A. Day silo captain.

Q. What silo?

A. Silo No. 2.

Q. In the complex at Elizabeth?

A. Known as Complex 2-C.

Q. What was the relationship of the Martin Company to your company?

Mr. Mott: Just a minute, I think he can testify generally, but if we are getting into any legal conclusions or technical matters of that sort—

Mr. Kripke: I am just trying to show a chain of command.

The Court: All right, you may proceed.

A. Could I have the question again?

Q. What was the relationship of Martin Company to Sverdrup & Parcel?

A. Sverdrup & Parcel had a contract to provide engineering services for American Machine and Foundry Company in connection with the engineering and construction of the launcher system in the silos. American Machine and Foundry had a contract with Martin to provide the design and construction of this launcher system.

Q. Now, what generally was the relationship between the Martin Company and Eby Construction, if you know?

A. I—

[fol. 12] Mr. Mott: That's certainly objectionable.

The Court: Objection sustained.

Q. Well, was there any relationship between Sverdrup & Parcel and Eby Construction Company that you know?

A. As a day silo captain working on the complex, I could request from the Eby carpenters that they place or remove or provide us with different scaffolding at different places, such as the A.M.F. contract to be brought to completion.

Q. Were there others who also had this prerogative?

A. Any craft working in the silo could request a scaffold.

Q. How many crafts were there in the silo?

A. Well, the A.M.E. contract craft, millwrights, electricians, steelworkers. There was also other contractors involved.

Q. Mr. Blanchard, directing your attention to August 3, 1961, can you tell us what was going on that day insofar as the structure or the construction of Silo No. 2 was involved?

A. We did not have access to the silo during the morning because the Corps contract was running a test on a pipe. However, the Martin people came to us at noon time and said we would have sole occupancy of the silo for the rest of the day to run a test referring to the first running of the launcher under its own machinery.

Q. This was the very first time it had been run?

A. This was the very first time it had been run under its own power. Approximately one or two o'clock that

afternoon, we moved into the silo the first time that day. Any A.M.F. craft or A.M.F. people were in the silo, and I requested the Eby day superintendent, who I believe was named McWilliams, that he clear the silo of all scaffolding in preparation for the first movement of this launcher. This would take a considerable amount of time because there was a lot of scaffolding, a lot of safety netting, so forth, throughout this silo. We then started to assign the A.M.F. craft for their particular jobs in connection with this launching movement. We had millwright design workers, electricians, pipefitters, all of them involved in the working of the system, to observe their portion of the mechanism to make sure nothing was wrong. So, after McWilliams started his men cleaning the hole, I started the rest of the afternoon giving assignments.

Q. That took you down to approximately what time?

[fol. 13] A. It was pretty near time for change in shifts, around four or four-thirty, before we were ready to actually start the movements of this launcher.

Q. And Gary Neely was on which shift at that time?

A. He was on the night shift.

Q. What was his job?

A. His shift was to carry on the work I had started during the nighttime, coordinate the day activities with night activities.

Q. Was his title Night Silo Captain?

A. That's correct.

Q. What was the relationship?

A. They worked together. In fact our hours overlapped such that we could coordinate our activities and keep the job moving along continuous to conclusion.

Q. Was one job considered better than the other?

A. Well, usually the day silo captain, having more craft and more people and more direct contact, usually, set the pattern for what was to be done and the night silo captain carried on.

Q. Do you know anything about the promotion that I spoke of?

A. Yes, I do.

Q. What was that?

A. He was to become a day silo captain in Silo No. 1 the following Monday.

Q. Now, going back to the afternoon of August 3rd, would you carry on and tell us what happened that you recall that's of significance here?

A. You mean from the change in shift on?

Q. Yes, please.

A. Well, approximately four or four-thirty, we had requested from the Morrison, Knudsen & Hardeman people that they keep most of their day shift on for the continuation of this test. We got the launcher ready for a movement. I think it first started moving approximately five o'clock. I was more or less centered at the middle height of the silo watching for clearances and so forth. As the few pieces of machinery started moving down and counterweights started moving up, Gary was located up on the drive mechanism with the people up there to make sure everything was moving smoothly. At approximately—with several stops along the way for removal of obstructions, at approximately a quarter to seven we discovered that a scaffold that I had requested be placed between the counterweight areas previously was a little too large, a little too extensive to allow the counter-weights to pass and to allow the engineering group to make the critical meas-
[fol. 14] urements that they needed. Gary was not present at that time. He was doing some other job. I was, and the millwrights' superintendent.

Q. I wonder if the jurors can hear you?

A. At that time the millwright superintendent hollered for either Gary or myself, knowing that both of us were present, to come and see what should be done to coordinate this activity to take these measurements. I discussed the problem with the engineering crew and they showed me where the scaffold was too extensive to allow for a plumb bob measurement from the locking device down to the locking pin that was centered on the counterweight.

So, we decided then that we would hold up the test for a few minutes, have the scaffold modified so these tests could be taken. I hollered for a carpenter and the night foreman approached me from the scaffold that was there. I was back under the drive base on the concrete and he was standing out on the scaffold.

Q. This drive base is where?

A. Very top of the silo.

Q. I see.

A. I was kneeling there on the concrete, talking to him, and he was standing on the scaffold. I pointed out to him, "This piece of wood is in our way making our measurements. Could you please get it modified as soon as possible so we can continue our tests?" He told me he would do this, and so we had our A.M.F. craft stand by while the carpenters remodified this scaffold.

Q. All right, and this modification or some modification was done?

A. This modification was carried out. Approximately twenty or twenty-five minutes after seven, I was given the word—I don't know this date who gave it to me—the scaffolding was completed. I told the M.K. and H. superintendent that his millwrights could carry out their measurements, and at this time I became concerned about the approach of the craft lunch hour in connection with our test. I went back in the scaffold area to see how these measurements were progressing. Gary was standing on the scaffold and assured me everything was going all right, and so I then went topside to find the M.K. and H. superintendent to see if we could have the craft work through the lunch hour until the test was completed.

Q. What was Gary doing on the scaffold?

A. He was standing on the scaffold with his notebook [fol. 15] on the rail, talking to the millwrights. I got his attention and I asked him how things were going and he said, "Everything is under control," or something of that nature.

Q. Do you know if he had begun the measurements?

A. I do not know if he had started it yet.

Q. And what is the next thing, sir?

A. I went topside. I found the M.K. and H. superintendent just outside of the silo mouth. He was in the pickup truck. I was standing there talking to him discussing this possibility of craft working through their lunch hour when Chester Wing, another superintendent of M.K. and H., a night superintendent, ran by us telling us that a man had fallen from top to bottom and he was on the way to get an ambulance.

Q. Do you know how far Gary fell?

A. In exact number of feet, I couldn't say. Be approximately ten stories to twelve stories.

(Plaintiff's Exhibits Nos. 1, 2, 3, 4, 5 and 6 were marked for identification.)

Q. Mr. Blanchard, I hand you what are marked for identification as Plaintiff's Exhibits 1 through 6, inclusive. Would you please look at these photographs and just tell me generally what they represent?

A. No. 1—

The Court: Don't show it to the Jury.

A. (Continued) Okay. No. 1 is a view from the silo wall towards the center of the silo, showing the top of the counterweight in relationship to the scaffold in question.

Q. All right, No. 2? Just go through them quickly.

A. No. 2 is a view from a similar position a little further to the left from No. 1, showing again the relationship of the scaffold to the top of the counterweight.

Q. All right, 3, sir, No. 3.

A. No. 3 is another view taken from a wood stairway that existed on the westerly face of the silo, looking towards the scaffold and the top of the counterweight. No. 4 is a view looking from the bottom of the silo up towards the counterweight in the locked-in position up through the shaft that the counterweight moves in, and No. 5 is a view of the bottom of the silo at the position the counterweight comes to rest when the launcher is up. No 6 is a view

taken from the silo mouth looking towards the drive mechanism, and the counterweights are just below this drive mechanism.

[fol. 16] Q. Mr. Blanchard, can you tell me whether or not these six pictures accurately represent the scene as it appeared on that evening of August 3, 1961?

A. Yes, they do.

Q. Would it be helpful to use these in explaining to the Jury just what happened?

A. Yes.

Q. Now, there are captions on them, cover sheets, which orient what they are. Are these accurate? Have you read these and are they accurate?

A. No, I have not read them.

Q. Would you check them over and see if they are?

A. No. 1 is correct. No. 2 is correct. 3 is correct. 4 is correct. 5 is all right. 6 is correct.

Q. Have you seen these pictures before?

A. Yes, I have.

Mr. Kripke: Your Honor, I offer into evidence Exhibits 1 through 6 inclusive.

Mr. Mott: Could we ask the witness a few questions about these, if it please the Court?

The Court: Yes, you may.

Voir Dire examination.

By Mr. Mott:

Q. Mr. Blanchard, I believe you testified, did you not, that you were not present in the actual area where the accident happened at the moment it did happen, is that correct?

A. Yes.

Q. Do you know when these pictures were taken, Exhibits 1 through 6?

A. As I understand, they were taken the following morning. No craft were allowed back in the silo that day for the purposes of investigation and picture taking.

Q. They were taken the next day?

A. That's correct.

Q. And you are not able to state, are you, that the things that are portrayed in these pictures are exactly in the same position that they were at the time the accident happened, is that right?

A. Only insofar as no work was carried on in the silo from the time the accident occurred.

Q. But you were not present from the time that you left shortly before the accident until when? When did you next go back into this area after the accident happened?

A. Not until the following Monday.

Q. And these pictures were taken what day?

A. On Friday.

[fol. 17] Q. And you were not present then when the pictures were taken?

A. We were not allowed there, no.

Q. Do you know from what angle these pictures were taken?

A. Knowing the layout of the silo, I could judge approximately what it was.

Q. They are distorted somewhat, are they not, as far as the relative relationships between various objects that are portrayed in there?

A. As any photograph might be.

Mr. Mott: Well, we would object at this time to the introduction of these pictures, if it please the Court. The witness said he was not there when the accident happened. He wasn't there until some two or three days later, and he was not present when these pictures were taken and cannot state positively whether anything was moved between the time of the accident and the time the pictures were taken. Also, that they do show some distortion.

The Court: May I see the exhibits, please?

I think at this point we will have a brief recess.

Ladies and gentlemen of the Jury, you may go to your jury room. Now, during this recess, together with any other recesses we may have during the progress of the

trial and until the case is finally submitted to you for your deliberation, you should not discuss the case either among yourselves or with any other person. I ask you not to discuss the case among yourselves, because you should not start talking about the case until you have heard all the evidence in the case, the summation of counsel and the Court's instructions. So at this time you may leave the jury box. The bailiff will escort you to your jury room.

We will be in recess for approximately ten minutes.

(The Jury withdrew from the courtroom and the following proceedings were had outside the presence of the Jury.)

Outside the Presence of the Jury

The Court: Mr. Kripke, do you have any response to the objection that counsel has made to the tendered exhibits?

Mr. Kripke: Well, perhaps I better ask Mr. Blanchard one or two more questions. I don't think I can bring out anything particularly new, but it might bring out something.

[fol. 18] The Court: All right.

Direct examination.

By Mr. Kripke (Continued):

Q. Did I understand you to say there were no craft allowed into that silo between the time of the accident and the next Monday, when was it?

A. The Air Force and Martin together excluded anybody from that silo the day after the accident.

Q. For what purpose?

A. For an investigation.

Q. Was this an official government investigation?

A. I don't believe the Air Force wanted to get involved in an official investigation.

Q. Do you know who conducted it?

A. I know A.M.F. was very interested. Other than that, I don't know for sure.

Q. Do those pictures portray the conditions at the time you left the silo on August 3, 1961?

A. Yes.

Mr. Kripke: I have nothing further.

Mr. Mott: If it please the Court, I would like to ask the witness one further question.

Voir Dire examination.

By Mr. Mott:

Q. Specifically, Mr. Blanchard, I see a net in there in Exhibit No. 4. Was there a net in there at the time?

A. The nets were secured by A.M.F. in connection with tying down the launcher to leave the silo. They added the nets for investigation purposes so no further people would be hurt, and the pictures were taken after those nets were added.

Colloquy Between Court and Counsel

The Court: Does the net appear in any of the other exhibits, Mr. Mott? It looks like a part of a net in 6.

Mr. Mott: That's in a different part of the place. As I understand, the thing we are talking about is over in here. I don't know what that is in there.

The Court: This looks—

Mr. Mott: Oh, I see, yes. I didn't notice that.

[fol. 19] Mr. Kripke: That's not where he fell, Your Honor.

Mr. Mott: If it is not where he fell, it is not material anywhere.

Mr. Kripke: You misunderstand. Where you are pointing to, where the net is, is not where he fell. He fell through the hole back here, you can see, and you can see part of the scaffolding. This is the drive shaft that was talked about.

The Court: Well, do you have any specific objection to 6 then?

Mr. Mott: No, for the reason it does show part of a net, I certainly object to that.

Mr. Baum: It is in the crib.

Mr. Mott: Well, I know, but if it is in the crib it isn't in the part of the silo where the accident happened.

The Court: Well, let's see here.

Mr. Kripke: Your Honor, I do know we ought to know specifically which he is objecting to.

The Court: I am sure he said 4.

Mr. Mott: I specifically mentioned the nets in 4. I actually objected to all of them.

The Court: Yes, he specifically mentioned the net in 4, and I inquired about 6, and he now stated he objected to that.

Now, if you can have the witness explain 6, maybe that net was there prior to the accident. You can ask him.

Direct examination.

By Mr. Kripke (Continued):

Q. Let's take these. As to 4, Mr. Blanchard, was this netting that is in the silo proper there at the time of the accident?

A. No, it was not. It was added later to protect the people making the investigation.

[fol. 20] Q. Now, as to Exhibit 6, was that netting there?

A. That was not there at the time of the accident.

Q. Do these pictures other than that accurately represent the scene?

A. Yes, sir.

Colloquy Between Court and Counsel

Mr. Kripke: Your Honor, we have no way of replacing these pictures with pictures that don't have nets, and they are certainly useful to explain the circumstances to the

Jury. The Jury could be specifically instructed the nets in those two pictures were not in place.

The Court: Do you, Mr. Mott, feel that the showing of nets here prejudices your case?

Mr. Mott: Yes. It puts them in a position to argue that nets were put up there subsequent to that and anything done there after the accident happened couldn't be used to prove anything in this case.

The Court: All right, the objections will be sustained to 4 and 6 and will be overruled to the other four, and those four will be received.

(Plaintiff's Exhibits Nos. 1, 2, 3 and 5 were received in evidence.)

The Court: We will take a brief recess, gentlemen.

(The court recessed from 11:15 o'clock a.m. until 11:30 o'clock a.m.)

(The Jury returned to the courtroom and the following further proceedings were had in the presence of the Jury.)

In Open Court

Mr. Kripke: May it please the Court, it is my understanding that Exhibits 1, 2, 3 and 5 are admitted, and to numbers 2 and 4 the objection was sustained.

The Court: 4 and 6.

Mr. Kripke: 4 and 6, I am sorry.

[fol. 21] The Court: That's right.

Direct examination.

By Mr. Kripke (Continued):

Q. Mr. Blanchard, would you mind stepping from the box and taking Exhibit 1 and showing it to the Jury and orienting to them, explaining, what the picture is about?

A. I wonder if I could use the board?

Q. Yes, please do.

A. (Witness drawing on blackboard.) Picture, if you will, a large cylindrical hole in the ground, about ten

stories high. Near the top of this hole, but still not at ground level, is an area back over in here with a concrete base, above which is located all the drive machinery for this system, and located within this hole is a steel framework which we all referred to as a crib, in which the launcher was able to ride up and down. For purposes of construction, we had this circle divided into quadrants, so that if anybody wanted to know where we were working, we were working in such-and-such a quadrant. Those were divided in this way: This was Quadrant I, Quadrant II, Quadrant III, and Quadrant IV. The counterweights that we have been referring to rode in Quadrant II and in Quadrant III, and they rode a system of rigid rails that were fixed back here into the concrete, and they had an odd shape such as they would fit the cylindrical shape of the silo as well as ride up and down and clear the crib.

Now, with that in mind, I believe I can orient you in respect to the pictures. This picture, No. 1, is taken from about this position, looking over the counterweight towards the area that was scaffold. The cables in the picture are the cables that connect the counterweight mechanism with the launcher mechanism to help balance it. At this point, the counterweights are approximately six feet from their locking mechanism. They still had six more feet to come up.

Q. Can that be seen in that picture?

A. Pardon?

Q. Can that be seen, the locking mechanism and the distance, in that picture?

A. The locking mechanism in the counterweights are these two holes right here. The locking mechanism up on the drive are these two pins right—there is one right there and one right there. These two pins would go into these two holes when the counterweights were up.

Q. Can this be seen better in Picture No. 2?

[fol. 22] A. Picture No. 2 was taken a little further over in this direction, showing the same general area. You see the locking mechanism, the counterweight and the locking

mechanism at the top. And during the process of construction, there was a series of wooden stairs built in this section, Quadrant I and II, for access of the different craft to and from the hole, carrying out their work, and Picture No. 3 was taken approximately in that position on the stairway, showing the same general area. Picture No. 5 is taken at the bottom of the silo from on top of some steel grating, looking over in this direction. You can see these two counterweight rails and the pit in which this counterweight rested when the launcher is up in the area.

Q. You would look straight up? From that Picture No. 5, you would be looking up at the bottom of the counterweights?

A. When the counterweight is in the up and locked position, from that picture you would see up to the bottom.

Q. That would be Counterweight No. 2?

A. The counterweight in the second quadrant.

Q. Now, I think that's sufficient for the diagram, Mr. Blanchard. Now, there are a few more questions I want to ask you. Do those pictures show the scaffold that we have been talking about?

A. Three of them do, yes.

Q. Now, going back, what specifically did you tell this gentleman from Eby that you spoke to about this scaffolding?

Mr. Mott: I think we ought to identify who this person is. He never mentioned him by name or any other way, and I think before he can answer that he should at least identify to whom he was speaking.

The Court: I think he said he didn't know the person. Do you know the person to whom you spoke?

The Witness: Unfortunately, he was the day shift man. These carpenters—

The Court: Well, just answer my question.

The Witness: No.

The Court: All right.

By Mr. Kripke:

Q. I see. Well, can you identify in any way the man you spoke with?

A. I know he was a foreman.

[fol. 23] Q. Of the Eby group?

A. Of the Eby group.

Q. It was he you spoke with?

A. Yes.

Q. What was it you told him?

Mr. Mott: Well—

The Court: Describe the man. You can identify him in more detail than just that. He can describe the man and say foreman of what shift and so forth.

A. He was a foreman of the evening shift for the Eby carpenters. He was rather short, slight build, talked with a rather high-pitched voice.

Q. You don't recall his first name?

A. No.

Q. All right, what was it you talked to him about?

A. I showed him where the scaffold that was there was in the way of our measurements, specifically a plumb bob measurement to be taken from the drive base locking mechanism to the counterweight locking mechanism, and I asked him to revise this scaffold so that we would be able to take this measurement.

Q. I see, to revise it so that you would be able to take the measurements?

A. Yes.

Q. Now, what is the extent of your education and background, Mr. Blanchard?

A. I have a bachelor's degree in civil engineering from Northern University in Boston, Massachusetts. A master's degree in civil engineering from Princeton Polytechnic Institute in Princeton, New York.

Q. Have you done any teaching?

A. Approximately five years.

Q. What?

A. Rensselaer Polytechnic Institute.

Q. What were you teaching?

A. Juniors and seniors in construction engineering.

Q. From your familiarity with the scaffolding involved here, with Counterweights 2 and 3, and from your educational background and experience in structural engineering, are you able to state, sir, whether or not, and this just calls for a yes or no answer, whether or not that scaffolding was adequate and proper to do the job that you had?

A. I did not consider it so.

Q. Why did you not consider it so?

Mr. Mott: Just a minute, if it please the Court, I thought he was supposed to answer that question yes or no, and go from there.

[fol. 24] The Court: He was instructed to. Counsel told him to say yes or no, and he didn't follow the instructions. Do you want the answer stricken?

Mr. Mott: Absolutely. I would like to be—

The Court: I will grant your motion to strike the answer, yes, it was not responsive.

Q. Just a yes or no at this point.

A. No.

Q. Did you understand the question? The question was whether or not as a result of your background and experience and your observations of this scaffold, you are now able to express an opinion from an engineering viewpoint as to whether or not this scaffold was adequate and proper for the purpose it was to be used.

A. No.

Q. You are not able to do so?

A. Well, I am sorry.

Q. Did I word it—

A. Could you give it to me again, please?

Q. Yes, as a result of your knowledge of the scaffold and your background and experience in structural engineering, are you able to express an opinion as to whether or not this particular scaffold was adequate and proper for the job for which it was designed?

A. Yes.

Q. I am going to ask you next, what was that opinion, and Mr. Mott is going to object, but I will ask now what was that opinion?

Mr. Mott: To which we object, and I would like to be heard on this point. This is not a matter which is subject to any opinion testimony of this type.

The Court: Your objection is sustained.

Mr. Kripke: Your Honor, may I make an offer of proof outside of the presence of the Jury in this matter?

The Court: Yes, we will do it at the next recess on this point.

Mr. Mott: Well, I have a motion I want to make at this time, if it please the Court.

[fol. 25] The Court: Well, counsel, approach the bench and state to the reporter—I will be able to hear you, you tell the reporter on the record what you want.

At the Bench

MOTION FOR MISTRIAL AND DENIAL THEREOF

Mr. Mott: At this time the defendant moves for a mistrial for the reason that the witness, despite cautioning by counsel and Court, has already expressed his opinion with regard to his scaffolding. It is not an opinion which can properly be given. The Court has so held at this time, and at this point this evidence is before the Jury.

Mr. Kripke: May it please the Court, counsel was very slow to respond and allowed the answer to go in before he made his objection. There was plenty of time in which to make his objection when he saw the witness was not responding properly.

Mr. Mott: He only said two words.

The Court: Well, the motion for mistrial will be denied. I don't know whether I struck the answer from the record or not.

Mr. Mott: Yes, you did.

The Court: And instructed the Jury?

Mr. Kripke: I think you did, sir.
The Court: All right, the motion will be denied.
Mr. Kripke: And at the next recess—
The Court: Yes.

In Open Court

Mr. Kripke: May we approach the bench again?
The Court: Yes.

At the Bench

[fol. 26] Mr. Kripke: May it please the Court, could I ask whether the reason for sustaining the question is whether I did not properly lay a foundation?

The Court: The reason was that this was not the proper subject for opinion evidence, and that's the basis on which I sustained the objection.

Mr. Kripke: As to whether the scaffold is properly and adequately built?

The Court: That's right. This is what the Jury is to determine from the factual evidence, as to how it was built and so forth.

In Open Court

Mr. Kripke: All right, sir, I have no further questions of this witness.
The Court: All right.

Cross examination.

By Mr. Mott:

Q. Mr. Blanchard, I believe you have testified, have you not, that you are at the present time in the employ of Sverdrup & Parcel?

A. That's correct.

Q. And that is an engineering firm in St. Louis or in the St. Louis area, is it not?

A. Yes.

Q. That was the same company, was it not, who employed Mr. Neely at the time of this accident?

A. Yes.

Q. Now, as day silo captain—I believe that's what you said you were, was it not?

A. Yes, sir.

Q. Were your duties confined to this particular silo?

A. That's correct, sir.

Q. And, in other words, all the work or at least most of the work that you did out there was in this one silo that you sketched on the board?

A. Right, sir.

Q. And, of course, it is true, I am sure, is it not, that there were other silos in that area?

A. Yes, sir.

Q. But you were just in this one?

A. Yes.

Q. Now, if any of this information is in any way classified, Mr. Blanchard, and you cannot answer it, please say so. Are you able to give the circumference of the silo?

[fol. 27] A. This would only be from memory.

Q. Well, approximately.

A. Approximately 50 feet.

Q. That would be 50 feet?

A. In diameter.

Q. In diameter, and are you permitted to give the depth?

A. I would judge about 130 or 140 feet.

Q. Now, there were numerous crafts working in that area, were there not?

A. There were.

Q. And not only were there numerous crafts, Mr. Blanchard, but they were also employed by numerous or at least several contractors, is that right?

A. During the test, they tried to limit the occupation of the hole pretty much to one contractor.

Q. And it was—or, one of your duties was to coordinate the crafts that were working, is that right?

A. The A.M.F. crafts.

Q. Sir?

A. Only American Machine and Foundry crafts.

Q. Now, you say that Mr. Neely was employed by Sverdrup & Parcel. You also mentioned millwrights I

believe that were in the area at the time. Do you know who employed them?

A. They were employed by Morrison, Knudsen and Hardeman, but I was considering them as A.M.F. craft because they were working for A.M.F.

Q. In other words, when you wanted something done, you felt you could request these millwrights to do it?

A. Through their supervisors.

Q. And this would also be true of other crafts who were in the area and working on a given test, was it not?

A. Yes.

Q. Now, I don't know if you testified to this or not, sir, but in the crib that you have drawn on this blackboard diagram, this square that is more or less positioned in the center of the circle, that's actually where the missile itself would go up and down, is that right?

A. That's correct, sir.

Q. And it went up, did it not, or down on what you might call a launcher platform?

A. Correct.

Q. And it is also true, is it not, that the launcher or platform occupied most of this crib area when it was moving?

A. That's correct.

Q. And when the crib or when the launcher went down, the counterweights that you have drawn on there went up?

A. That's right.

Q. And when the counterweights went up, the launcher went down?

A. Correct.

Q. Now, earlier on this day—what time did you go to work on August 3, 1961?

A. Our work day started at 7:00.

[fol. 28] Q. And sometime during that day and prior to the accident we are talking about, you were given the first opportunity, is that what you said, to actually observe the operation of the launcher up and down?

A. This was the first opportunity for this complex to see a launcher driven under its own power, right.

Q. And when you came to work that day, was the launcher at the bottom or at the top, if you recall?

A. The launcher was at the top.

Q. And during the day, Mr. Blanchard, did you observe the lowering of the launcher from the top to the bottom?

A. During the operation of this test, yes.

Q. At approximately when did the lowering of the launcher begin?

A. It was late afternoon, after the change of the Morrison-Knudsen shift.

Q. Were measurements made while the launcher was being lowered?

A. No, sir.

Q. I believe you have testified, have you not, that the launcher wasn't really lowered all the way to the bottom, is that correct?

A. That's correct.

Q. Is that because there is some critical distance in there which you wanted to measure?

A. Yes, sir.

Q. In other words, it was not lowered to the bottom essentially?

A. That's correct.

Q. That's an unfair way to put it. It was lowered to an area short of the bottom essentially?

A. Right.

Q. About how far was that?

A. In the neighborhood of six feet.

Q. And if the launcher was about six feet from the bottom, then the counterweights will be about six feet from the top?

A. That's correct.

Q. And there were some critical measurements to be made while the counterweights were in that position, is that correct?

A. Correct.

Q. And is it also not correct, Mr. Blanchard, that in order to make the measurements on the counterweights,

it was necessary for somebody to get out on the counterweights?

A. That's correct.

Q. How many people were needed to actually get onto the counterweight?

A. Well, all craft had to work in pairs, so there would be a minimum of two. We had assigned two to each counterweight, plus the supervisor.

[fol. 29] Q. What's this square area at the top of this diagram on the blackboard?

A. That is the location of the drive mechanism for the launcher.

Q. Now, there was no way, was there, Mr. Blanchard, in which the measurements could be made on these counterweights from the top, is that right?

A. That's right.

Q. Somebody had to get down onto them?

A. That's correct.

Q. You determined, did you not, that a platform should be installed between the two counterweights.

A. This was set down in the test procedure, yes, sir.

Q. And then you directed that that be done, is that correct?

A. Correct.

Q. And you say that you made that direction to the Eby night carpenter foreman?

A. The day shift provided me the original scaffold.

Q. When was the original platform put in there?

A. Earlier in the week.

Q. How long had it been there?

A. Several days.

Q. But at any rate, when the launcher was lowered, you determined that the scaffold or the platform there interfered with the counterweights, is that correct?

A. It interfered with our making a plumb line measurement.

Q. So, on the afternoon before or just before the accident happened, you directed that this platform be modified, is that right?

A. I told the foreman to modify it so we could make these measurements.

Q. And you say the platform without modifications had been there about a week?

A. Several days.

Q. And during that period of time, who used the platform?

A. Nobody.

Q. You had observed it, however, had you not?

A. There was no need for its use.

Q. Well, you saw it there.

A. Yes.

Q. And then the modification that you requested was to make it a little smaller, was it not?

A. Fix it so we could make these measurements.

Q. Did you discuss this with a Mr. Beardsley of Martin Company just before?

A. No, sir.

Q. But you did direct the carpenter foreman to modify this platform?

A. Correct.

Q. Where were you physically when you made that direction?

[fol. 30] A. I was kneeling on the concrete about where the arrow is with a No. 1 on it.

Q. You mean this No. 1 up here? (Indicating blackboard.)

A. Right.

Q. I will put a circle around it, so we won't be talking about this Roman Numeral I at the bottom. (Marking on diagram.) In other words, you were at the top level, then?

A. Still not quite ground surface, but at the top of the cylindrical hole, yes, sir.

Q. Where was the carpenter foreman, when you made those directions?

A. He was standing on the scaffold as it had been for several days.

Q. Just a few feet from you then?

A. Right.

Q. And you stayed there, did you not, while he did the modification?

A. No, I did not.

Q. Where did you go?

A. I was involved with many other things going on in the silo. I had to see about getting this craft and this lunch hour business straightened up.

Q. Well, would that take you out of the silo area then?

A. It would take me to find the supervisor of personnel that I would have to contact.

Q. Well, how far did you go?

A. About 40 feet below this point, there is a personnel tunnel coming in from the tunnels connecting the complex. I went down to that area.

Q. Well, could you see up to the top when you were down there?

A. I may have been able to. I don't recall if I did.

Q. Your men or nobody employed by S & P was on this platform while it was being modified, were they?

A. To my memory, it wasn't.

Q. The platform was about six feet, was it not, below the top or below the highest point that the counterweight would reach?

A. An average man could stand on it without bumping his head.

Q. And the platform extended, did it not, from the silo wall there, that circle, out onto that I-beam at the top?

A. Which platform, the one that was there originally or the new one?

Q. Well, where was the one that was there originally?

[fol. 31] A. The one that was there originally had a walkway coming from the wooden stairs over to it and it was extended from the I-beam back to the silo wall and it overlapped the counterweight area slightly.

Q. Would that be in this area here I am pointing to with my pencil?

A. No, sir.

Q. Where was it? Would you put a mark on there where it was? The original platform, I am talking about.

A. The original platform I requested from these people took in about this area, together with a walkway with handrail going over to the stairs.

Q. Then you ordered that the thing be made smaller, did you not?

A. I ordered it revised so that these measurements could be taken.

Q. On an up and down level, where was this old platform with relation to the counterweight?

A. The supporting members rested on the I-beams in the crib. I would judge it was the same level as the second one that was built.

Q. At any rate, the platform was on the level that you wanted it, was it not?

A. Correct.

Q. How many carpenters worked on the modification?

A. There is a question about that, sir.

Q. Well, were you there?

A. It was all that was on the night shift, I know.

Q. Well, you say that you talked to the night carpenter or the carpenter foreman there and told them to do this work. Were you there when he started?

A. No, sir.

Q. Were you there while the work was being done?

A. No, sir.

Q. Were you there when the work was finished?

A. Stopped there briefly to talk to Gary later, yes.

Q. Were the carpenters gone at that time?

A. Yes.

Q. Then you gave the order, did you not, for the millwrights to start making the measurements?

A. Somehow, I received word that the scaffold was complete, and I told the M.K.H. millwrights they could make their measurements.

Q. Where were you when you told the M.K.H. millwrights they could make the measurements?

A. Over on the stairway.

Q. At what level?

A. Between the personnel tunnel and the top.

Q. How far below the platform would you be when you said that?

A. About 20 feet.

[fol. 32] Q. About that time, the carpenters were gone, were they not?

A. If they weren't, they were getting ready to.

Q. You made no effort to keep them there any longer?

A. No, sir, it was their lunch hour.

Q. The platform was where you wanted it then, wasn't it?

A. I can't say that I actually looked at it and said, "This is it, that is what I want," no.

Q. At any rate, you told the M.K.H. millwrights to go on there?

A. Told them to go ahead and make their measurements.

Q. And that's what the platform was there for in the first place, wasn't it?

A. For access, yes.

Q. Do you know how far the floor of the platform was above or below the top of the counterweights?

A. Only from measurements I had seen from a diagram later.

Q. How far was that?

A. Less than two feet.

Q. How far was the edge of the platform from the counterweights on a horizontal plane?

A. From one to two feet.

Q. Now, I show you Exhibit 1, Mr. Blanchard, and ask you whether or not this platform that appears on the right side, I guess you would call it, of the photograph is the platform we are talking about.

A. That's correct.

Q. Would you put a "P" on that, please?

Mr. Mott: Should we mark this, Judge, or do you have anything special?

The Court: Whatever would show up.

A. Mark a "P" where?

Q. On the platform I just mentioned.

A. (Witness marked on exhibit.)

Q. Thank you, sir, and is the counterweight or one of the counterweights in the lower portion of this picture?

A. That's correct, sir.

Q. Would you put a "C" on that?

A. It goes from here to here. (Marking on exhibit.)

Q. All right, put another "C" on the other half of it.

A. (Witness marked on exhibit.)

Q. That's all one counterweight, where the two "C's" are, is that correct?

A. Yes.

Q. And then it was about two feet then from the platform to the top of the counterweight?

A. Less than two feet.

Q. And two feet or less than two feet from the edge of the platform to the edge of the counterweight?

A. Yes.

[fol. 33] Q. Is that right?

A. Yes.

Q. When the millwrights were going to go on or started to go on with the platform, then you were down on these stairs, about 20 feet below?

A. Correct, sir.

Q. Then after you went up, or I mean after that, did you then go up to the platform where the millwrights were?

A. I went up in around back of where the drive mechanism was and kneeled down on the concrete about the same position that I had talked to the Eby foreman at.

Q. In other words, you went out to this place where there is a "1" with a circle around it?

A. Right.

Q. Which would be about six feet above the platform.

A. Well, the concrete was only about four feet. The underneath, where the lock mechanism was, was six feet. There was a space you could look through.

Q. You could look down and see the platform?

A. Yes, sir.

Q. Were the millwrights on it?

A. At that time only Gary was there.

Q. Could you observe some millwrights?

A. I observed one or two here and there.

Q. At the time you observed Mr. Neely, that particular moment, he had a notebook or something?

A. Yes, sir.

Q. He was recording measurements that were being yelled to him from these millwrights?

A. I believe he was getting ready to record them, yes, sir.

Q. He made some statement to you that everything was under control?

A. Correct.

Q. And you left?

A. Yes, sir.

Q. And shortly after that you were told that the accident happened?

A. That a man had fallen, yes.

Q. Now, the platform we are talking about here, Mr. Blanchard, that's a temporary setup, is it not?

A. That's a temporary scaffold, yes.

Q. It wasn't a permanent part of the installation at all?

A. No.

Q. And it was something that would be changed sometimes from hour to hour, would it not?

A. Correct.

Q. And this whole situation was a sort of, oh, progressively changing one, was it not?

A. As the construction proceeded, yes, sir.

Q. This area was well lighted at the time, was it not?

A. It had the permanent silo lights, plus some extension cords.

Q. Well, it wasn't dark in there?

[fol. 34] A. Well, it isn't as well lighted as this is right here.

Q. At any rate, you could see from where you were at—number one, you could see the platform?

A. Correct, sir.

Q. You could see the counterweights?

A. Correct, sir.

Q. And you could see that there was a gap between them, couldn't you?

A. Yes, sir.

Mr. Mott: I have no further questions.

Mr. Kripke: I have a few questions, Your Honor. I will try to make this quick.

Redirect examination.

By Mr. Kripke:

Q. Is there a colored chalk there? Mr. Blanchard, would you mind coming forward again and drawing for us the area that this platform or scaffold covered after it was modified?

A. It went approximately in this area. (Witness drawing on blackboard.)

Q. That will be the yellow rectangle that you have now drawn, part of it dotted?

A. Yes.

Q. Do you know where the railings were?

A. I believe there was one across the back and one part way down this side.

Q. Ending where?

A. About even with the front of the counterweight.

Q. So that there was an opening between this crib wall or whatever you call it and the end of the railing, is that correct?

A. Yes.

Q. All right, one other thing, what would the distance have been from this point where the scaffolding met the crib wall on a diagonal to the nearest corner of the counterweight approximately?

A. You mean on going down as well as across and around? Less than two feet here and less than two feet here.

Q. All right, what would it be if the counterweight were level to the scaffold?

A. Less than two feet from here to the counterweight.

Q. I mean, what would be the diagonal, the difference from that point to that point, if the counterweight were even with the scaffold?

A. About two feet, maybe a little more.

Q. Now, as I understand it, the scaffold was not even with the counterweight, is that right?

[fol. 35] A. The elevation of the counterweight was dictated by the beam that rested on the crib.

Q. You mean the scaffold?

A. Right, the scaffold, the height of it was dictated by what was resting on the crib.

Q. How far below that was the counterweight?

A. Less than two feet.

Q. Now, what was it—so that we will be clear on it—what was it that—in what way was it that Eby did not comply with your request?

Mr. Mott: Just a minute, I don't think he said they didn't in the first place.

Mr. Kripke: Let me ask the preliminary question, Your Honor?

The Court: All right.

Mr. Mott: He said he wasn't there when they left.

The Court: Well, the objection is sustained. You may proceed with your interrogation.

Q. Did Eby comply with your request with regard to this modification?

Mr. Mott: Objected to for the same reason. This isn't an equity contract anyway.

Mr. Kripke: This is not the question.

The Court: There is no evidence he made any request other than to modify it so he could measure it with a plumb, that's my understanding of his testimony.

Mr. Kripke: Well, perhaps I better be a bit more specific.

The Court: All right.

Q. Mr. Blanchard, were you any more specific than that when you spoke with the Eby night carpenter foreman? What is it that you asked him to do?

A. I showed him that we couldn't make our plumb measurement, would he please revise the scaffold so we could. [fol. 36] Q. Well, now did you ask him—can you tell us whether you asked him to build the scaffolding from counterweight to counterweight or not? Did you have any conversation like that?

A. Directly, I don't recall.

Q. Now, the carpenter craft is a completely different craft, is that right?

A. They were not part of our A.M.F. craft, no.

Q. What would happen if somebody in the A.M.F. craft tried to make any revisions in the scaffold?

Mr. Mott: Objection as immaterial, if it please the Court.

The Court: Objection sustained.

Q. Can you tell us whether or not there was planking around, any loose planking around, of any kind aronnd handy?

A. We had just removed considerable scaffolding from the hole and stored it topside to make room for this launching.

Q. So, is your answer no?

A. There would be plenty of scaffolding around, scaffolding material.

Q. Would your people of your craft be permitted to either make a catway across there or anything else?

Mr. Mott: Objected to as immaterial.

The Court: The objection will be overruled. You may answer the question.

A. Could I have that question again, please?

Q. Yes, would your people be permitted to use that planking or loose scaffolding in any way to bridge the gap?

A. No, sir.
Q. Why not?
A. It was not part of their jurisdiction.
Q. Was it part of your jurisdiction?
A. No, sir.
Q. Whose jurisdiction would it have been?
A. It is the carpenters' and their work, their contractor.

Mr. Kripke: Thank you, Mr. Blanchard, I have no further questions.

Mr. Mott: We have no further questions.

The Court: You are excused, Mr. Blanchard.

[fol. 37]

COLLOQUY BETWEEN COURT AND COUNSEL

Outside of the Presence of the Jury.

The Court: All right, Mr. Kripke, do you want to put in the record your offer of proof?

Mr. Kripke: Your Honor, the Court having ruled that it sustained the objection on the ground that this is not a matter of expert testimony, of course, it serves no value to put in or advise the Court of what the evidence would be. Obviously, the man was going to testify it was defective because it didn't cover the distance between the two counterweights, obviously, and left gaps, for one thing, and because of the railings.

But, your Honor, I believe there is ample law in Colorado to the effect that various matters of testimony which are not within the common knowledge are proper as expert testimony. One, the case I think of is Remley vs. Newton, a Colorado case.

The Court: Mr. Kripke, the Court has ruled and has permitted you to make an offer of proof. I don't want to rehash my ruling. I have ruled.

Mr. Kripke: Well, Your Honor, there is no need of my making the offer of proof on the fact that that was the ground on which the objection was sustained.

In Open Court

ARNOLD KEENAN called as a witness by the plaintiff, being first duly sworn, on his oath testified as follows:

Direct examination.

By Mr. Kripke:

Q. What is your name, please?
A. Arnold Keenan.
Q. Your address, sir?
A. 1629 Manitou Boulevard, Colorado Springs.
Q. What is your occupation?
A. I am a carpenter.
Q. For how long have you been a carpenter?
A. Twelve years.
Q. By whom were you employed on August 3, 1961?
A. Martin K. Eby.
Q. That's the defendant, Martin K. Eby Construction Company?
A. Yes, sir.
[fol. 38] Q. On what job, sir?
A. On the missile base at Site 2C.
Q. Mr. Keenan, I want to direct your attention to August 3, 1961. On that day, did you have occasion to participate in a modification of certain scaffolding close to the top of the hole, near the drive shaft?
A. I did.
Q. And in that modification, were you acting in the scope and course of your employment for Eby?
A. Yes.
Q. What was your experience with scaffolding? How much of it had you made in your lifetime or how much scaffolding have you been on or had occasion to observe?
A. On the missile bases, it was about two months, a month and a half.
Q. Have you had occasion in your work as a carpenter at other times to work on scaffolds?
A. Yes, sir.

Q. Now, do you recall receiving orders on August 3, 1961, to modify that scaffolding?

A. Yes, sir.

Q. Who was that from?

A. Wayne Imel, carpenter foreman.

Q. Was he the night foreman?

A. Yes, sir, carpenter foreman.

Q. Would you describe him?

A. He is short, light complected, talks in a high-pitched voice.

Q. He was the same—strike that. Was there only one night carpenter foreman in Silo No. 2?

A. Yes, sir.

Q. Was he an employee of Eby Construction Company?

A. Yes, sir.

Q. Now, did you then proceed to modify that scaffolding?

A. Beg pardon, sir?

Q. Did you then proceed to modify the scaffolding?

A. Yes, sir.

Q. Can you tell us what you did? First, I perhaps better ask how many men were involved in that operation.

A. There were several laborers, myself and another carpenter, and there might have been one more, and Wayne Imel, the carpenter foreman.

Q. All right, can you tell me now what you did?

A. The scaffold was already torn out and we were ready to put the other scoffold in its place. We took 4 by 4's and placed them from the crib to the top of the approximately 12-inch or 18-inch water main that goes around the outside of the silo.

Q. Could we stop just there? Mr. Blanchard previously made the drawing on the board. Have you had occasion to previously see it?

A. No.

[fol. 39] Q. Well, by looking at this drawing, can you understand it?

A. Yes.

Q. It has four quadrants, Roman Numerals I, II, III

and IV, and this is where I believe the missile would be, in the middle, and up here in yellow, Mr. Blanchard marked his impressions of what he thought the scaffold to be, the position, after it was modified. Do you understand this?

A. Yes, completely.

Q. And Counterweight No. 3 is over here and Counterbalance No. 2 is over here, is that right?

A. Yes.

Q. Does this square with your recollection of where the scaffold was?

A. Yes.

Q. All right, now, you have said that you stretched your platform from this line, and what is that, sir?

A. That is part of the crib, an I-beam.

Q. To the rounded part of the wall?

A. Yes, there is a water main that goes around the outside, and we laid the 4 by 4's on top of that water main to support it.

Q. Fine, all right, and then you proceeded to put the planking down?

A. Yes, we used 2 by 12-s on top of that, running parallel to the 4 by 4's, and then placed plywood decking on top of the 2 by 12's.

Q. Now, Mr. Blanchard testified there was a railing placed by you fellows on the back of the scaffolding, on the side of the outer wall and down this side—

Mr. Mott: Just a minute, if it please the Court, I think that's a leading question. If he is going to ask him what he put there, that's certainly proper.

The Court: Objection sustained.

Q. All right, I will just ask it this way. Where did you put the railing on the scaffolding?

A. We put the rail along the outside of the concrete cylinder, also along—which would be the west side of the scaffold.

Q. Counterweight No. 2 is on the west side?

A. On the Quad II side.

Q. Now, how far down did you put the railing?

A. Approximately three feet from the crib itself.

[fol. 40] Q. Did you bring it all the way down to the wall of the crib?

A. No, we were told to leave an opening for the craft men to leave the scaffold to reach the counterweight.

Q. I see. Where were you told to leave this opening?

A. Exactly where the picture shows it.

Q. And was it Mr. Imel that told you that?

Mr. Mott: He didn't say that. That's a leading question.

The Court: Objection sustained.

Q. Who was it that told you that?

A. Wayne Imel, carpenter foreman.

Q. Now, Mr. Keenan, was this scaffold as safe as it could have been?

Mr. Mott: Just a minute, we certainly object. That calls for an improper conclusion.

The Court: The objection is sustained.

Q. Can you tell me why, Mr. Keenan, the railing was built as it was on the Quad II side and not on the Quad III side? Do you know that?

Mr. Mott: Objected to as being asked and answered.

The Court: The objection is overruled. You may answer this question.

A. Will you repeat that question, please?

Q. Yes, do you know why the railing was built as it was on the Quad II side and on the back of the scaffold, but not on the Quad III side?

A. The only way I can say is because evidently we did not have time to put it there.

Q. Now, did you understand what the purpose of the scaffold was going to be?

A. Yes.

Q. And what was that?

A. So that the other crafts men could align the pins with the counterweight.

Q. I see. Did you understand that in order to do that they had to actually get out onto the counterweights?

A. Yes, sir.

[fol. 41] Q. Can you tell me why the opening on the Quad II side was not prepared at a point directly opposite the counterweight?

Mr. Mott: Objected to as being asked and answered. He said he put it where he was told to put it.

The Court: Objection sustained.

Q. Mr. Keenan, if you had your choice in the matter, would you have put that opening in another place?

Mr. Mott: Objected to as being absolutely immaterial.

The Court: Objection sustained.

Q. What would you have done, had you had your choice?

Mr. Mott: Same objection, if it please the Court.

The Court: Objection sustained.

Q. Mr. Keenan, what was underneath the scaffold?

A. Directly underneath the scaffold, sir?

Q. Yes.

A. Lot of air. Nothing, sir.

Q. Can you tell me what the prescribed method was for getting from the scaffold to the counterweight on each side?

Mr. Mott: Objected to as being outside the scope of this witness' knowledge. As I understand, he left before the work was started, before the millwrights came. It will be beyond his information that way as to what other workmen were supposed to do.

The Court: Yes, the objection is sustained.

Mr. Kripke: I have no further questions of this witness, Your Honor.

Cross examination.

By Mr. Mott:

Q. Mr. Keenan, what time did you come to work on August 3, 1961?

[fol. 42] A. Well, they were changing shifts back and forth, but I believe it was either 3:30 or 4:30, sir.

Q. What time did you commence the work that you did on this platform you just described?

A. Right before dinner. That would be about 6:30, I believe, sir.

Q. How long had you been working at the missile site there prior to this?

A. Approximately a month and a half.

Q. Was your work at the time the accident happened here in August of 1961 confined to this one particular silo, or did you move around from silo to silo or what?

A. We moved around from silo to silo.

Q. And your foreman was Mr. Imel?

A. Yes, sir.

Q. And you were working in that area as a carpenter, is that right?

A. Yes, sir.

Q. When the Martin Company—did Martin Company have people around there that you knew or saw?

A. At the immediate time, I don't know if there was or not.

Q. Well, no, just generally.

A. Yes, sir.

Q. When they asked you to put something up, you would put it up, didn't you?

A. Well, no, sir. We received our instructions from the carpenter foreman.

Q. That would be Mr. Imel?

A. Yes, sir.

Q. Had you done any work in that particular area there where this platform was on that date prior to about 6:30 when you did the work you have just testified about?

A. No; sir.

Q. Well, had there been a platform of some kind in that area when you started your work?

A. When I got to the place where we were to build that scaffold, if there was another scaffold there it was taken out.

Q. Nothing was there when you got there?

A. Right.

Q. So, you started from scratch?

A. Yes; sir.

Q. Mr. Imel was there when this platform was being built, wasn't he?

A. Yes, sir.

Q. Also the millwright foreman?

A. I believe he was, sir.

Q. Do you remember his name?

A. No, sir.

Q. He stayed right there while it was being built, didn't he?

A. I believe he did, sir.

Q. And then when you got through, the millwright foreman told you it was okay, didn't he?

A. He did not tell me that, sir.

[fol. 43] Q. At any rate, you left after it was finished, didn't you?

A. We went to dinner, yes, sir.

Q. The scaffold or the platform had been checked before you left, hadn't it?

Mr. Kripke: I don't think that's a specific enough question. Checked by whom?

Mr. Mott: I just asked if it had been checked by somebody before he left.

The Court: You may answer. If he knows.

A. I have to say I do not know. I do not remember.

Q. As a matter of fact, you don't leave work like that until it is checked, do you?

A. Normally not.

Q. And that was the case here, wasn't it, Mr. Keenan?

A. I have to repeat the answer to the question before last. I do not remember.

Q. Do you remember making a statement on February 24, 1963, about this accident?

A. What was that date?

Q. February 24, 1963.

A. To whom did I make a statement, sir?

Q. I don't know. To somebody in Colorado Springs.

A. What statement did I make?

The Court: He asked you if you remembered.

The Witness: Do I remember making a statement?

The Court: Yes.

The Witness: To somebody who came to my home, a lawyer or a representative?

Q. I believe so.

A. Yes, there was a man who came to my home and asked me to make—it wasn't exactly a statement, but he wanted me to review.

Q. And you talked to him about what happened out there on August 3, 1961, did you not?

A. Yes, sir.

Q. And he wrote down what you were talking about?

A. Yes, sir.

[fol. 44] Q. And after you got through, you read it, didn't you?

A. Yes, sir.

Q. And you signed it?

A. I believe I did, sir.

Q. And didn't you say this, "Foreman Imel was right there when we got through and he checked the scaffold and we checked it, too. There were several men around and we were told the scaffold was all right, so we went to lunch."

Mr. Kripke: Just a moment, Your Honor, this is an improper way to get hearsay into the case, what somebody told somebody.

The Court: Well, the last part of it, what you read, would be hearsay, but the first part would not. So, the last part—

Mr. Kripke: My objection only goes to the last part.

Mr. Mott: He testified—

The Court: Just a minute, let the Court rule. The objection is sustained as to the last part of the statement that counsel read, of which the tenor was, "We were told—" that's stricken from the record, ladies and gentlemen.

All right, now, Mr. Mott, you may proceed.

The Witness: Are you waiting on an answer from me, sir?

Mr. Mott: No.

The Court: No.

Q. You were not present when the accident happened, were you?

A. No, we were eating lunch.

Mr. Mott: I have no further questions.

Redirect examination.

By Mr. Kripke:

Q. Mr. Keenan, were you told by Mr. Imel or by anybody else what clearance to provide between the platform and the counterweights?

[fol. 45] Mr. Mott: Objected to as far as "by anybody else," if it please the Court.

Q. Were you told by anybody?

Mr. Mott: Same objection. That was the question that I mentioned.

The Court: The objection is sustained. You may ask him if he was told by Mr. Imel. He has testified Mr. Imel was the foreman.

Q. All right, were you told by Mr. Imel what clearance to provide between the counterweight and the scaffold?

A. No.

Q. So that the clearance then that was the final route was whose decision? Who was it that decided?

Mr. Mott: Objected to if he wasn't told by Mr. Imel. We are getting into hearsay again, if it please the Court. They are asking him for a decision that somebody made out of his presence.

The Court: You may ask him if he knows, and then if he answers that affirmatively, then the following question.

Q. Do you know whose decision it was to build the scaffold in the dimensions that it was built?

A. I believe it would go back to the millwright foreman, sir.

Q. Do you know that of your own knowledge?

Mr. Mott: Objected to as being asked and answered. Cross-examining his own witness now.

Mr. Kripke: Well, we are trying to find out what the basis of the knowledge is.

The Court: Yes, that's right. Do you know that of your own knowledge?

A. Repeat the question, please.

Q. Do you know that of your own knowledge?

A. That the millwright foreman told—

[fol. 46] Q. Yes, are you talking about a conversation that took place in your presence or something?

A. No, I did not hear the conversation.

Q. You didn't hear any conversation?

A. No.

Mr. Kripke: Your Honor, I am going to ask that that be stricken with reference as to who made the decision.

Mr. Mott: I don't think it is proper to have his own witness' testimony stricken, Your Honor.

The Court: No, the answer will stand.

Q. Now, it is my understanding that your work was done at the request of Mr. Imel, is that right?

A. Yes, sir.

Q. And it was his orders you were following in the size of the scaffold?

A. Yes, sir.

Q. And any conversation that somebody might have had with him was outside of your presence?

A. Yes, sir.

Q. Now, do you recall what time the lunch hour was that night?

A. It must have been right at 6:30, sir. If you would give me the time that the accident occurred, I could give you more accurate time.

Q. If the accident occurred at 7:45—

The Court: Well, just a moment. The questions will come from counsel, not from the witness.

Q. You believe your lunch hour was around 6:30?

A. Yes, sir.

Q. Do you recall whether you worked on the scaffold after lunch?

A. No, we did not.

Q. Had you returned from lunch at the time this accident happened?

A. No, about fifteen minutes after we started eating, we were informed of the accident.

Q. I see. Was the scaffolding completed at that time?

A. Yes, sir, it must have been.

Q. It was completed as far as it was going to be built?

A. Yes, sir.

Q. Then, there was no intention, or you had not been told, to complete the railing, is that right?

[fol. 47] Mr. Mott: Objected to as a leading question.

The Court: Objection sustained.

Mr. Kripke: That's all.

Mr. Mott: I have no further questions. Oh, I am sorry.

By Mr. Kripke:

Q. Mr. Keenan, could your lunch have been at 7:30, rather than 6:30?

A. Like I said before, I wasn't sure if we started at 3:30 or 4:30. If we started at 4:30, it would have been 7:30.

Q. So your lunch would have been 6:30 or 7:30, depending on what time you started?

A. Yes, sir.

BRUCE WILHOIT called as a witness by the plaintiff, having been first duly sworn, on his oath testified as follows:

Direct examination.

By Mr. Kripke:

Q. What is your name, please?

A. Bruce Wilhoit.

Q. Your address, sir?

A. Middletown, Ohio.

Q. Your occupation?

A. Millwright.

Q. What was your occupation on August 3, 1961?

A. Millwright.

Q. How long have you been a millwright?

A. Fifteen years.

Q. Can you tell me what a millwright is, what he does?

A. A millwright sets lines and levels machinery. He is a machinery erector.

Q. And by whom were you employed on August 3, 1961?

A. Morrison-Knudsen.

Q. Can you tell me exactly what your job was?

A. On that date?

Q. Well, no, just generally what was your job?

A. Generally was lining and leveling and setting machinery on the site.

Q. This was at Missile No. 2?

A. That's right.

Q. Or Silo No. 2 out there at Elizabeth?

A. That's right.

Q. Now, on the day, on August 3, 1961, what was your job?

A. My job was to check and lock clearance parallel with the actual lock itself going into the counterweight.

[fol. 48] Q. Can you explain to the Court and Jury what you were doing or what you were about to do and so forth?

A. The counterweight lock is in the counterweight itself, the hole for the lock. I could explain it with a picture, if you—

Q. Let me hand you Exhibits 1, 2, 3 and 5. With the use of these pictures, can you better explain it?

A. Yes.

Q. All right.

A. With Picture 1, I was checking the hole in the counterweight for the lock to enter. We were taking the dimensions with a plumb bob from the lock itself to the edge of the hole, checking the inside diameter of the hole to the outside of the lock, to make sure everything would click before the operation continued to lock again.

Q. What kind of instruments were necessary to measure this type of thing?

A. We had inside mikes and a set of outside mikes.

Q. A mike is a micrometer?

A. A micrometer.

Q. These then were very precise instruments?

A. Yes, sir.

Q. Were inches or a fraction of an inch used?

A. Thousandths.

Q. Thousandths of an inch?

A. Yes.

Q. Where were the counterweights with reference to the top of the silo at that time?

A. I would say between six to seven foot below.

Q. Who were you working with on that operation?

A. Mr. Gary Neely and Mr. McCoun, Tom Bowen, which was my foreman, and I mean that was actually the people that I was actually working with.

Q. Had you already begun the measurements before this accident occurred?

A. Already begun before?

Q. Yes.

A. Yes, we had.

Q. Where had you been?

A. We had been on the opposite counterweight. I believe this would be the west counterweight there, the way it is from here.

Q. I see. Can you see the diagram that Mr. Blanchard drew on the board earlier?

A. Yes, sir.

Q. Can you orient yourself on that?

A. Yes, sir.

Q. Would it be this counterweight closest to Roman Numeral III?

A. Yes, sir.

Q. Who had been out there and what had you been doing?

[fol. 49] A. Myself, McCoun and Mr. Neely and Mr. Bowen was on the counterweight. Mr. McCoun and myself were taking the measurements. Mr. Neely was writing them down and checking them as we were taking them.

Q. Was this his job?

A. Yes, it was.

Q. How did you folks get from the scaffolding to the counterweight?

A. I came from the scaffolding across the cribbing on the inside of the crib, crossed and jumped over to the counterweight.

Q. How did the others come?

A. Probably the same way, but on this side you could jump either right off of it, right onto the counterweight.

Q. On this side of the platform?

A. On this side of the platform.

Q. Why was that?

A. There was no railing there.

Q. Were there any railings on that platform?

A. Yes, there was a railing in the back, facing the—the wall, the silo wall.

Q. Back here?

A. Yes, sir, and a railing running this way.

Q. How far down?

A. Approximately, oh, three-quarters of the scaffolding.

Q. Then, after you completed your measurements on No. III, tell us what transpired, what took place.

A. I proceeded from No. III up onto the scaffolding, walked across the scaffolding, stepped up onto the crib steel, finished walking across the crib steel, jumped over onto the top of the counterweight.

Q. That's onto this counterweight?

A. That counterweight.

Q. I see.

A. The counterweight has a recess in it to where I—

Q. Can you show that to the Jury, so the Jury will know exactly where you were at that moment? You can step out of the witness box and show them more closely.

A. I jumped from the crib steel, which is here, to this point, and then I proceeded myself to get into the hole in the counterweight.

Q. All right, thank you. Then do you recall the sequence of events which followed?

A. Yes, very well.

Q. Will you please tell us?

A. After I proceeded into the hole, I took hold of the cables that is coming into the counterweight with my right hand. I turned for a minute to see if my buddy and Mr. [fol. 50] Neely were coming over at that time to help with this one, if they were ready. Just as I turned, I saw Mr. Neely coming across the scaffolding, and I didn't keep an eye right on him at the time. I just looked to see if they were coming. I took my safety belt and snapped it around, which it has a cable on it, snapped it around the cables and snapped it on my other side. Just as I did that, I just happened to glance up and saw Mr. Neely coming head first by the counterweight. With my left hand I made a grab and grabbed the back of his shirt. With a sudden jerk his shirt flipped out of my hand and he proceeded on down.

Q. Did you see him go on down?

A. Yes, sir, the whole way.

Q. Would you describe his fall?

A. He went down past the counterweight, made a slight turn. His head or hands hit, I would say approximately 25 foot down. He made one complete turn in the air, proceeded on down farther, which distance looking down you can't describe in feet. His feet hit in the back on the rail, in one of the rails. His shoe came off. He turned half over again and went, proceeded down farther, and hit his head. His head hit. He turned face up, looking straight up in the hole, and hit flat in the bottom.

Q. Do you know how far he fell?

A. I would say 120 feet.

Q. Now, Mr. Wilhoit, have you worked on scaffolding before?

A. Yes, sir.

Q. To what extent do you have knowledge of scaffolding?

A. Just about every job has some on it. In years of experience, probably fifteen years of scaffolding.

Q. Would you be in a position to be able to express an opinion as to whether a specific piece of scaffolding is inadequate of improper in any way?

Mr. Mott: Objected to. At this point, I understand the answer to be yes or no, nothing else.

The Court: Yes, that's right. You answer yes or no.

A. Yes.

Q. Would you express that opinion?

Mr. Mott: We object as being outside of the scope of the issues in this case and irrelevant.

The Court: The objection is sustained.

[fol. 51] Mr. Kripke: I am afraid I misphrased my question. Let me ask this another way for the purpose of the record.

Q. Are you in a position to pass an opinion as to this specific scaffolding in this silo on August 3, 1961?

Mr. Mott: Object to that, if it please the Court. The Court has already ruled this is not a subject for this opinion.

A. Yes.
Q. What is that opinion?

Mr. Mott: We object.
The Court: Now, the objection is sustained.
Mr. Kripke: Your Honor, that's on the same ground as the previous one?
The Court: Yes.

Q. Can you tell me how far it was, Mr. Wilhoit, from the place where the scaffolding met this beam to the nearest corner of the counterweight.
A. I would say approximately two foot.
Q. And now, that would be on a level?
A. That's right.
Q. Now, was the counterweight level with the platform at that time?
A. No, it wasn't.
Q. What then would have been the direct line distance from that corner to the corner of the counterweight, as it existed at that time? That is, down?
A. I would say approximately three and a half foot.
Q. Was there anything between that point and the floor of the silo to break Mr. Neely's fall?
A. No, sir.

Mr. Kripke: I have no further questions, Your Honor.

Cross examination.

By Mr. Mott:

Q. I believe you stated, Mr. Wilhoit, that you were a millwright at the time this accident happened?
A. Yes, sir.
Q. And that you were working for Morrison-Knudsen?
A. Yes, sir.
[fol. 52] Q. I believe you mentioned two men with whom you were working, Mr. McCoun and Mr. Bowen.
A. That's right.

Q. Do you recall Mr. Haven?

A. Not right off. Not working with me directly, no.

Q. You don't think he was working with you on this day?

A. He was on the job that day.

Q. Also Mr. Usselman?

A. Frank Usselman was my general foreman.

Q. Did you say a minute ago—I may have misunderstood you, Mr. Wilhoit, but Mr. Boyles being your foreman?

A. Mr. Boyles, Mr. Tom Boyles, was my foreman. Frank Usselman was my general foreman.

Q. And all of you worked for Morrison-Knudsen?

A. Yes, sir.

Q. Mr. Neely, you understand, was not an employee of Morrison-Knudsen?

A. That's right.

Q. And do you know who he was employed by?

A. S & P, as far as I know.

Q. Now, were you working in this particular silo the entire day prior to the time the accident happened?

A. Yes, sir.

Q. What levels have you worked at?

A. I had worked at the drive level.

Q. Which is the drive level?

A. Which is just above the platform, just above the scaffolding.

Q. Is that all?

A. I was assigned to that area with Mr. Neely.

Q. What time did you get there then?

A. I was on the job approximately a quarter to four.

Q. And what did you do between a quarter of four and the time that you went out to make these measurements?

A. We stood by on the drive, preparing for the operation to begin.

Q. When you say "we," "We stood by on the drive," who do you mean?

A. Mr. McCoun, myself, and Mr. Neely, and which Mr. Neely was busy. He was in charge of the operation. And,

Mr. Bowen my foreman, and I don't know if Frank, the general foreman, was there all the time or not.

Q. And would that be—where were you standing, would that be up in the neighborhood of where this "1" with the circle around it is?

A. Yes.

Q. The persons you have mentioned stood there in that area for how long before you started making measurements?

[fol. 53] A. I suppose we were there approximately three hours or better.

Q. When you first got there, was there any platform or scaffolding in the area between the two counterweights up there at the level where you were?

A. I think they had been removed on the day shift.

Q. Was Mr. Blanchard there, too?

A. At the time or before.

Q. Before.

A. Yes, he was.

Q. And you heard him give the order to put this platform in, did you not?

A. No, sir, I never.

Q. You were there when the platform was being put in, were you not?

A. Yes, sir.

Q. And you could watch the carpenters while they were working?

A. If I wanted to.

Q. And was Mr. Neely there all that time?

A. Yes, sir.

Q. And it is true, is it not, that none of the millwrights put this platform in?

A. None.

Q. And later on, the carpenters left, did they not?

A. Yes, sir.

Q. And they were told that they were through?

A. You mean—that would be beyond my knowledge whether they were told they were through or not.

Q. At least, they left.

A. They left.

Q. And somebody gave you an order to go out there and start measuring, didn't they?

A. Yes, sir.

Q. Who was that?

A. Mr. Bowen.

Q. Is that Boyles or Bowen?

A. I think it was Bowen. I think Tom.

Q. His first name was Tom?

A. Tom Bowen.

Q. He was your foreman, is that right?

A. Yes, sir.

Q. Was Mr. Usselman around, too?

A. I couldn't say.

Q. At any rate, Mr. Boyles told you to go out and start making measurements, is that right?

A. That's right.

Q. And then you proceeded, did you not, to this platform?

A. Yes, sir.

Q. And who went down onto the platform with you?

A. Mr. McCoun, Mr. Bowen and Mr. Neely.

Q. What about Mr. Haven? Wasn't he there, too?

A. I mean, he could have been there, but not on the platform wth us. There was not that much room on the platform.

Q. And then you yourself, did you not, moved from the platform over here to what we call the No. III counterweight?

A. Yes, sir.

[fol. 54] Q. And who else went out onto the counterweight with you?

A. Mr. McCoun and Mr. Bowen and Mr. Neely.

Q. Isn't it true that Mr. Neely stayed on the platform?

A. No, sir.

Q. Now, how many of you do you say were on that counterweight on the third quadrant?

A. On the third quadrant or first quadrant?

Q. Well, I call this the third one.

A. Oh, that's fine. How many? There was four of us.

Q. And that would be you—

A. Mr. McCoun and Mr. Neely and Tom, the foreman, and Frank, the general foreman, was not there.

Q. And Mr. Neely had a note book with him?

A. Yes, sir.

Q. Was that on a metal pad or wooden pad?

A. It was a small black notebook.

Q. And he stood on the counterweight with the other three of you?

A. Yes, sir.

Q. And the three of you made the measurements?

A. Myself and Mr. McCoun and Mr. Neely.

Q. Mr. Neely actually got down and made the measurements?

A. No, sir, myself and Mr. McCoun made the measurements. Mr. Neely checked our measurements.

Q. And wrote them down?

A. And wrote them down.

Q. Was he standing or sitting when he was writing these measurements down?

A. He would have to stand.

Q. And I assume from what you said you completed the measurements on the third quad.

A. Yes, sir.

Q. Then, did all four of you move from the third quadrant counterweight to the platform?

A. Not just—one at a time went across. We all moved to the platform. That was the way to get to the other quadrant.

Q. Who was the first one to leave the platform for the second quadrant?

A. I was.

Q. And who was right behind you? Mr. McCoun?

A. Mr. Neely.

Q. Mr. Neely and then Mr. McCoun?

A. I believe it was Mr. McCoun.

Q. And then who?

A. I would assume that Mr. Bowen would have been the fourth one.

Q. Now, you say that you got from the platform to the counterweight by stepping from the platform to the I-beam?

A. Yes, sir.

Q. Could you show on the exhibit here, on Exhibit No. 1, and speak up, she has to write it down—would you show the Jury? This is the platform here?

A. That's right.

[fol. 55] Q. That's just the way it was?

A. That's right.

Q. It has a "B" written on there. You can see it. We had an awful time with the pen I believe.

A. I see.

Q. Now, would you show the Jury—you had your feet on this platform, is that right?

A. Yes, sir.

Q. Then you stepped where?

A. As I stepped into the structural steel, into the crib steel here.

Q. Would you put a mark, an "O"?

A. I will put the "O" and an arrow. (Witness writing on diagram.)

Q. All right, sir, would you step up here? As I understand, you stepped from this platform here, is that right?

A. Yes, sir.

Q. And you stepped onto this I-beam, where you have marked an "O" and an arrow?

A. Yes, sir.

Q. You stepped down onto the counterweight?

A. I probably made another step in the I-beam and got ahold of the cable and jumped into the counterweight.

Q. You say the counterweight was about two feet below the platform?

A. Probably.

Q. That would be two feet below from the counterweight in the picture?

A. Yes, sir.

Q. You also say the edge of the platform was about two feet from the edge of the counterweight?

A. Yes, sir.

Q. Then, when you got down into the counterweight, did you step in this area that's recessed?

A. There is an area in here that's recessed, a bigger area than this. This is the lock. There is an area in here recessed, which is in this photograph, in No. 2, and in this area.

Q. How far was the cable here from the I-beam, the cable that appears in Exhibit 1?

A. Approximately 2½ feet.

Q. So you had to reach out about 2½ feet and hang onto the cable, is that right?

A. Yes, sir.

Q. And then from the cable you got to the counterweight?

A. Got to the counterweight, to the top of the counterweight, and then stepped into the recess.

Q. When you stepped into the recess, did you then let go of the cable?

A. With one hand. I let go of the cable and grabbed this cable here with my right hand.

Q. Which is the cable that you hung on to on the way over?

A. This cable here, I never hung onto it on the way over. I just walked across and just got ahold of it as I was going across, just to balance.

[fol. 56] Q. But, then, your hand on the cable went down after you went into the recess?

A. Yes, sir.

Q. Thank you. What kind of shoes were you wearing?

A. I was wearing what we call a wedge boot.

Q. What kind of soles do those have?

A. A flat sole, no heels. It is on a sponge type sole, Neolite sole. It was a sponge type sole, wedge sole.

Q. Did you notice what kind of shoes Mr. Neely was wearing?

A. No, sir, I never.

Q. Now, it was right after you got into the recess of this counterweight, wasn't it, that you saw Mr. Neely falling?

A. I was in the counterweight. When I got to the counterweight, I looked back to see if they were coming.

Q. And at that point, Mr. Neely was still on the platform?

A. He was coming across the platform then. I took time to hook my safety belt around this cable. I hooked my safety belt. I turned. Mr. Neely was heading face down, coming at me, which not completely vertical, but he was falling. His feet were coming off the platform, and he was just, say, in a dive.

Q. What I was getting at, when you first got over to the counterweight—we are not talking about the one where you were when the accident happened. When you first got over to the counterweight, you turned back and saw Mr. Neely still on the platform?

A. He was coming up on the platform behind Mr. McCoun. I mean, in front of Mr. McCoun.

Q. He was still on the platform?

A. Yes, sir.

Q. He didn't have his hand on that railing or anything, did he?

A. No, sir, there is no railing there.

Q. Well, I am talking about the railing that's in this Exhibit No. 1, this railing here, upright I guess you call it.

A. When I got the counterweight and seen him, he was just coming up on the scaffolding on the other side where there was no railing. He hadn't—

Q. He hadn't walked across to the edge that appears in this picture, No. 1?

A. No, sir.

Q. All you saw was him walking across, and you turned your back, and the next thing you saw he was coming down?

A. I saw him coming down.

Q. You could see where you were going in this area, couldn't you?

A. Yes, sir.

Q. This platform didn't break at all, did it?

A. No, sir.

Q. That upright didn't break or anything?

A. No, sir, not to my knowledge.

[fol. 57] Q. Did you see Mr. Blanchard at any time between the time they started making the platform and the time of the accident?

A. No, I never.

Q. You didn't get onto the platform until the carpenters left, did you?

A. No, sir.

Q. You were told to go out there by your foreman?

A. That's right.

Q. Did Mr. Neely have the notebook in his hand when you last saw him before he fell?

A. I couldn't say.

Q. But he did have a notebook or whatever you call it when you were measuring on No. 3?

A. Yes.

Mr. Mott: I have no further questions, thank you.

Redirect Examination.

By Mr. Kripke:

Q. Mr. Wilhoit, I want to direct your attention to that same picture on which you just drew. Oh, I see. Would you mind stepping before the Jury once more, sir?

Now, am I right in saying that the spot you drew is quite close here to this 4 by 4?

A. Yes, sir.

Q. Now, there are a number of black spots to the outside of that, would be to the west.

A. Yes, sir.

Q. To the west of that. Do you know what those spots are?

A. No, I don't.

Q. Was there any grease in the place?

A. No, sir.

Q. This was not grease?

A. No, not grease.

Q. Now, Mr. Wilhoit, why didn't you go directly to the counterweight No. 2, rather than go—why didn't you go directly across?

Mr. Mott: Object to that. I think he described how he went, and the reasons I don't think are material, if it please the Court.

The Court: The objection is sustained.

Q. Mr. Mott asked you, established on cross-examination that the millwrights did not put the platform in. That's right, isn't it?

A. That's right.

Q. This was the carpenters who put the platform in?

A. That's right.

Q. Do you know why the millwrights didn't put the platform in?

A. Because—

[fol. 58] Mr. Mott: Objected to as immaterial.

Mr. Kripke: Counsel asked the question. I am just asking why.

The Court: All right, objection overruled. You may answer if you know.

A. (Continued) It is not our work.

Q. Can you tell us about how that works between crafts?

A. It takes in an awful big area, but millwrights do no carpenter work whatsoever.

Q. Mr. Wilhoit, was there any other way to get from the platform to Counterweight No. 2?

Mr. Mott: Objected to. It is the same question all over again. I think the pictures speak for themselves. He said they had to step down on there from the platform to the counterweight.

The Court: I am going to permit him to answer the question. You may answer the question.

A. There—you would have to—

The Court: No, he just asked you if there was any other way to get to the counterweight. You can answer yes or no.

A. Yes.

Q. What other way?

A. You could come across the platform onto the steel, as I did, or they had—the railing was cut where there was an opening that you could have went through, where I went through, and stepped onto the structural steel. The only other way would be to climb over a rail.

Q. To climb over the railing that was there?

A. Or either go back up into the drive section and jump down from there, which was a lot farther than the actual way they had built to go.

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(Plaintiff's Exhibits 7 and 8 were marked for identification.)

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[fol. 59] In Open Court

The Court: All right, Exhibits 7 and 8 will be received.

(Plaintiff's Exhibits 7 and 8 for identification were received in evidence.)

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Mr. Kripke: Your Honor, we have had a Polaroid photograph marked as Plaintiff's Exhibit 10, and I now offer it into evidence.

This is a photograph of the blackboard.

Mr. Mott: We have no objection.

The Court: The exhibit will be received in evidence.

(Plaintiff's Exhibit 10 for identification was received in evidence.)

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Mr. Kripke: Your Honor, subject only to the matter of the introduction of the Mortality Table, the plaintiff rests.

The Court: All right.

In Chambers

MOTION FOR INVOLUNTARY DISMISSAL OR FOR A DIRECTED VERDICT AND DENIAL THEREOF

Mr. Mott: At this time, now that the plaintiff has rested his case or her case, and proposes to offer no further evidence, the defendant moves for an involuntary dismissal of this action or for a directed verdict, whichever term the Court may determine appropriate, at this stage of the proceedings, for the following reasons: (1) There is no evidence of any negligence on the part of the defendant which proximately caused the accident in question.

(2) There is no evidence that anything that the defendant did or failed to do proximately caused the accident complained of.

(3) There is no evidence that the defendant breached any duty owing by it to plaintiff's decedent at the time of the accident.

[fol. 60] (4) It is uncontroverted that at the time of the accident the work done by the defendant had been completed and accepted by Sverdrup & Parcel or by Morrison-Knudson, or both.

(5) That even if any negligence be assumed at the outset, plaintiff's decedent was obviously guilty of negligence or contributory negligence as a matter of law, since the area in question was open and obvious and since there is in evidence no evidence of any hidden defect or situation of that type.

Now, that's the formal motion, if it please the Court, and I would like to make this statement at this time. In view of the complete lack of evidence that the plaintiff has put on at this stage of the proceedings, it is our present inten-

tion not to offer any further evidence, and for that reason I would like to make my complete motion at this time.

(Mr. Mott presented argument on the motion. Mr. Friedman presented argument on the motion. Mr. Mott presented rebuttal argument. Mr. Kripke presented argument.)

The Court: The Court feels in this case that the plaintiffs do not have a very strong case as far as the evidence is concerned.

Nevertheless, I do not think it proper to direct a verdict unless there is absolutely no evidence whatsoever which would sustain a verdict in favor of the plaintiff.

Now, I don't recall the evidence with the same degree of positiveness that counsel for the defendant apparently does, with particular reference to the acceptance of the work on the part of the millwrights. That is, the work in modifying the platform or the scaffolding.

Even if the millwrights had accepted it, there certainly is no evidence that Sverdrup & Parcel accepted it, and this is the subcontractor who was the employer of the deceased.

Now, I don't say that my recollection of the testimony is more accurate than counsel. This is a matter that the Jury will have to determine, what the evidence is in the case.

And, going a little further, I state this so that counsel will know my feeling in not only this case but other cases. I [fol. 61] don't think that the Federal Government is bound by the same procedural practices as the State Supreme Court. We are bound by the substantive law of the State in this case, but whether or not a directed verdict will be given is a matter where we follow—I like to think we follow what the Federal Courts have decided in these cases, rather than the State Courts, and it has been my experience and understanding that the Federal Courts look with more disfavor on directed verdicts for two reasons.

One is that, of course, there can be a motion—we will assume that the plaintiff recovers here—there could be a motion notwithstanding the verdict made, motion for judg-

ment, for the defendant, notwithstanding the verdict, and the Court, of course, would consider that after the trial, and would have an opportunity to reflect more on the factual situation and the legal situation as presented.

Secondly, assuming that the Court makes a mistake, even then, and the case goes to the Court of Appeals, if there had been a verdict in the favor of the plaintiff in this case, then the case would not have to be retried. The verdict would merely be reinstated, and it saves. It is a procedural matter. It is not a gimmick. It makes sense to me in close cases, and this is what I think this is.

As I said at the outset, I don't think the plaintiff has a strong case at all here. It is pretty weak. I am not critical of counsel. I mean, the factual situation.

Mr. Kripke: Yes, I understand.

The Court: I think that counsel presented everything they had, but, nevertheless, it is my belief that this Court should be absolutely and positively convinced that under no interpretation of the facts that are in evidence would the plaintiff be entitled to recover for the Court to take it away from the Jury entirely and say, "You are instructed to find for the defendant," and I merely add it in these last remarks because I don't think that our procedure necessarily follows or should necessarily follow the State procedure in this on this point, because we do have adequate procedural tools to remedy a situation if a mistake is made here, and particularly in the latter one. I think Moore —I am sure some of the authors discuss this matter. I [fol. 62] think Moore does, that as I said here, particularly where the defendant has indicated he will offer no evidence, so there will not be a burdensome record here, expensive additional testimony to be elicited, and a record made for review in the Appellate Court in the event that becomes necessary.

Of course, the question may be moot after the Jury comes in, so the Court is going to deny the motion as made in the alternative.

In Open Court

(The following proceedings were had in the presence of the Jury.)

WAYNE IMEL called as a witness by the defendant, having been first duly sworn, on his oath testified as follows:

Direct Examination.

By Mr. Mott:

Q. Would you state your name, please.
A. Wayne Imel.
Q. Where do you live, Mr. Imel?
A. 6250 North Federal.
Q. What is your present age?
A. Forty.
Q. Would you speak up so the Jury can hear you, please? What is your occupation, Mr. Imel?
A. Carpenter foreman.
Q. And who are you employed by at the present time?
A. Eby Construction Company.
Q. How long have you worked for Eby?
A. About seven years.
Q. Has all of that been in Colorada?
A. No.
Q. How long have you lived in Colorado?
A. Approximately three years.
Q. Mr. Imel, who were you working for in the month of August, 1961?
A. Eby Construction Company.
Q. And where were you working for Eby at that time?
A. Out here at 2-C missile site, by Elizabeth, Colorado.
Q. And what was your job on that missile site?
A. I was the carpenter foreman on the swing shift.
[fol. 63] Q. Do you recall how long you had been working at that missile site prior to August 3, 1961, approximately?

A. I believe I started out there approximately in April.

Q. Now, are you familiar with an accident which happened on August 3, 1961, involving Mr. Gary Neely?

A. Yes, I am.

Q. Were you present when the accident actually happened, Mr. Imel?

A. No.

Q. Where were you when you heard about the accident?

A. I was down in one of the AT's eating.

Q. Eating?

A. Yes, eating.

Q. What had you done just before you went to eat?

A. I had built a scaffold for them to work off of.

Q. Where did you build this scaffold?

A. It was in Silo No. 2, up approximately to the top of it, between two of the counterweights.

Q. Besides yourself—strike that. Did you actually participate in the work yourself?

A. No, I didn't. I supervised it.

Q. Were you there all the time it was going on?

A. Yes.

Q. Was anyone there besides—well, strike that. You supervised who, the carpenters?

A. Yes.

Q. Was there anybody there besides the carpenters while the work was going on?

A. There were several people around, but I don't know just exactly what their names were and what their jobs were. There was several people watching.

Q. Do you know a man by the name of Blanchard?

A. Yes, I do.

Q. Was he present, if you know, when you started to work?

A. He was present when we started, yes.

Q. Was he present when you finished?

A. Yes.

Q. Did you tell him you were going, leaving?

Mr. Kripke: Just a moment, the plaintiff, Sandra Neely, objects to any conversation which took place between this

gentleman and Mr. Blanchard or anybody else outside of the presence of Gary Neely.

Mr. Mott: If it please the Court, they have called this Mr. Blanchard as a witness.

Mr. Kripke: On the grounds of hearsay.

Mr. Mott: It is not hearsay.

[fol. 64] The Court: The objection is overruled. You may answer the question.

The Witness: What was the question?

Mr. Mott: I don't recall the question.

The Court: Will the reporter read it?

(The reporter read the pending question.)

A. Yes.

Q. Was the job finished at that time?

A. To his satisfaction, yes.

Mr. Kripke: May it please the Court, I think that's improper testimony.

The Court: The objection is sustained. The answer is stricken. The Jury is instructed to disregard the last answer.

Q. Did Mr. Blanchard make any statement to you before you left?

Mr. Kripke: If it please the Court, again, this is objectionable on the grounds it is leading, suggestive and hearsay.

The Court: The objection is overruled. You may answer.

Q. Did Mr. Blanchard make any statement to you before he left—before you left?

A. I asked him if he—

The Court: You can answer that question yes or no. Did he make any statement to you before he left? That was the question.

A. (Continued) Before he left or before I left?

Q. Before you left.

A. Yes.

Q. What was that statement?

A. That the scaffold was satisfactory to him.

Q. Where was he when he made that statement?

A. There was a ledge just above us a short ways and he was kneeled down on that ledge.

[fol. 65] Mr. Kripke: May it please the Court, the plaintiff objects to this testimony with reference to this conversation on the ground that this is improper. This is getting in by indirection a statement from Mr. Blanchard when the Court would not permit the plaintiff before to allow Mr. Blanchard's testimony as to his opinion of the scaffolding.

The Court: The objection is overruled.

Q. Did you do any work on the scaffold after that and before you went to supper?

A. I don't quite follow when you—

Q. After Mr. Blanchard made that statement, did you do any more work on the scaffold before you went to eat?

A. No.

Mr. Mott: Thank you.

Gross examination.

By Mr. Friedman:

Q. Mr. Imel, how long have you been an employee of Eby Construction Company?

A. Seven years.

Q. And how long have you been a carpenter foreman?

A. For Eby Construction Company?

Q. For Eby Construction Company.

A. Approximately four or five years.

Q. Do you work out of their local office here in Colorado?

A. Well, yes.

Q. Are you in any way attached to the business office, or are you still a carpenter foreman?

A. I am still a carpenter foreman.

Q. Are you presently working on any work for Eby Con-

struction Company? I don't mean just this time. I mean, at this particular time?

A. Yes.

Q. Are you supposed to be on a construction site?

A. Yes.

Q. On the date of this accident, you said that there were a number of people standing around while you were constructing this scaffold, is that correct?

A. Yes.

Q. I believe you also answered that you didn't know anyone there, is that correct?

A. I knew this Mr. Blanchard, and that was—as far as I can recall, he was about the only man that I knew. I had my dealings with Mr. Blanchard and he was really the only man that I was paying any attention to.

[fol. 66] Q. You had been on this construction site since April of 1961, is that correct?

A. Yes.

Q. This was August of 1961?

A. Right.

Q. Can you tell me in number, if not in name, how many people were standing there watching you?

A. No, I cannot.

Q. Were there five?

A. Yes.

Q. Ten?

A. I cannot tell you.

Q. More than ten?

A. I cannot answer, because I don't know. All I can say is there was a group of people there. Now, whether there was five, ten or fifteen, I can't tell you. There was over five.

Q. Were there carpenters there?

A. I had two carpenters there.

Q. Were there millwright workers there?

A. I can't tell you whether there was or not. Now, who was in the group of people, I did not pay any attention to them.

Q. How many railings were on this scaffold that you said you built?

A. Two.

Q. Is that the usual procedure?

Mr. Mott: Objection as immaterial.

The Court: Objection sustained.

Q. What was the position of the two railings that you mentioned were on this scaffold?

Mr. Mott: Objected to as being outside of the scope of direct testimony, if it please the Court.

The Court: Well, I will permit him to answer the question. The objection is overruled. You may answer.

A. I can't tell you what directions they were, because the directions don't mean anything to me in the silo.

Q. Mr. Imel, am I led to believe that you do not remember the directions of these railings, you do not remember how many people were watching, and you do not remember anyone in this crowd except Mr. Blanchard? Is that correct or not?

Mr. Mott: Objected to. He is asking what he believes.

The Court: The objection is sustained. The question is improper.

[fol. 67] Mr. Friedman: Excuse me just a minute.

(Counsel conferred.)

Mr. Friedman: Thank you very much.

Mr. Mott: We have no further questions.

The Court: You are excused, Mr. Imel.

Mr. Mott: We have no further testimony. The defendant rests, if it please the Court.

In Chambers

MOTION FOR A DIRECTED VERDICT AND DENIAL THEREOF

(The following proceedings were had outside of the presence of the Jury.)

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Mr. Mott: I want to, at the close of all the evidence, move for a directed verdict for each and every reason given in support of defendant's motion for involuntary dismissal or directed verdict made at the close of the plaintiff's case, and for the further reason that the evidence adduced subsequent to the denial of said motion clearly indicates and establishes freedom of negligence on the part of defendant.

The Court: The motion will be denied.

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In Open Court

(At 2:05 o'clock p.m., the following further proceedings were held in the courtroom in the presence of the Jury.)

CHARGE TO JURY

The Court: Ladies and gentlemen of the Jury: You have heard all of the evidence in the case and the summation of counsel, and it is now my duty as Judge to inform you what the law is that is applicable to this case.

[fol. 68] You, ladies and gentlemen, are the sole judges of the facts and credibility of the witnesses who have testified in the case, and you shall determine what weight you shall give to the respective witnesses' testimony. However, you are obliged to follow the law as I shall outline it to you, even though the law may be or may seem to be different to you than you believe it is or should be.

In her complaint here, the infant plaintiff states she was born on October 11, 1960, and that Cecile V. Neely is her custodian and legal guardian by order of course.

She further states that she is the only child of Gary Neely, who was killed on August 3, 1961, while working at Missile Silo No. 2, Complex 2-C, near Elizabeth, Colorado, and that she is a citizen and resident of the State of Missouri.

She charges that the death of her father, Gary Neely, was a direct result of the carelessness and negligence of the defendant Martin K. Eby Construction Company, Inc., and of its employees, who were then and there acting in the scope and course of their employment in the erection and maintenance and supervision of a certain scaffold.

She further states she was dependent on him for support and maintenance and as the direct result of the death of her father she has suffered pecuniary loss in excess of $25,000.

The defendant in its answer admits that Gary Neely was killed on August 3, 1961, while working in the missile silo described above, and the plaintiff is a resident and citizen of the State of Missouri. However, the defendant denies each and every other allegation contained in the plaintiff's complaint, and as an affirmative defense alleges that Gary Neely was guilty of contributory negligence which caused his death.

The foregoing are the issues as presented by the pleadings on file in the court and are not to be considered by you as evidence in the case.

The burden of the proof is on the plaintiff in this case to establish all the material allegations of her complaint by a preponderance of the evidence.

[fol. 69] The burden of proof is upon the defendant to establish his affirmative defense by a preponderance of the evidence.

Now, by burden of proof is meant the obligation resting upon the party or parties who assert a proposition to establish the same by a preponderance of the evidence.

And, by a preponderance of the evidence is meant that which is most convincing and satisfactory to you and which you believe is a truthful account of the matter in contro-

versy between the parties, even though the evidence is elicited from the testimony of the opposing party.

Now, in order for you to reach a conclusion that the plaintiff in this case has proven her case by a preponderance of the evidence, you must feel satisfied in your minds after hearing and weighing all of the evidence that the evidence produced by the plaintiff in this case outweighs the evidence produced by the defendant, and in order for you to reach the conclusion that the defendant has proven its affirmative defense you must feel satisfied in your minds after hearing all of the evidence that the evidence produced by the defendant as to such affirmative defense outweighs that produced by the plaintiff.

You are instructed, ladies and gentlemen, that the mere happening of an accident does not raise any presumption of negligence on the part of either the decedent in this case or the defendant.

A proximate cause of an injury is a cause which in a natural and continual sequence, unbroken by any independent cause, produces the injury, and without which such injury would not have occurred.

Negligence is the failure to exercise for the protection of others the care and caution that would be exercised by an ordinarily prudent person under the same circumstances. The failure to do what an ordinarily careful and prudent person would have done under all the circumstances of the case or the doing of something that an ordinarily prudent person would not have done under all of the circumstances of the case is negligence.

[fol. 70] You are instructed that contributory negligence as it is applied in this case is such negligence on the part of the deceased as helped to produce the injuries complained of, and without which they would not have occurred. Such negligence need not have been the sole cause of the injuries, but merely such that but for the negligence of the deceased they would not have occurred.

The issues to be determined by you in this case are these, ladies and gentlemen:

First, was the defendant negligent?

If your answer is no, then you will return a verdict for the defendant, but if your answer is yes, then you have a second issue to determine.

Namely, was the negligence of the defendant a proximate cause of the injury to the plaintiff?

Now, if your answer to that question is no, you will return a verdict for the defendant, but if your answer is yes, then you should find the answer to the third question.

Namely, was the decedent, plaintiff's father, contributorily negligent?

Now, if you find that he was not, having found in the plaintiff's favor in answer to the first two questions, you should determine then the amount of the plaintiff's damages and return a verdict in favor of the plaintiff and for that amount.

On the other hand, if you find that the decedent, plaintiff's father, was contributorily negligent and that his fault contributed as a proximate cause of any of the injuries which may have been sustained, then you will return a verdict for the defendant.

Now, the defendant, Martin K. Eby Construction Company, a foreign corporation, is a corporation, and as such can act only through its officers and its employees.

Acts and omissions of such employees done within the scope of their authority are in contemplation of law the acts and omissions of the corporation.

[fol. 71] The Court instructs you, ladies and gentlemen, that the defendant was not an insurer of the safety of Gary Lee Neely, deceased, and that the only duty owed by the defendant to the deceased was to exercise reasonable care, to construct a platform which was reasonably safe and adequate to accomplish the purposes for which it was built, in the light of all the facts and circumstances as shown by the evidence in this case.

You are instructed that if from a preponderance of the evidence and from the instructions given you in this case your findings should be in favor of the plaintiff, the damages

to be awarded to her, if any, must be limited to such sum of money as you may deem fair and just compensation to her for the net pecuniary or monetary loss, if any, which you may believe from a preponderance of the evidence she has necessarily sustained by reason of the death of her father, Gary Lee Neely, and also having regard to the mitigating or aggravating circumstances attending the alleged wrongful act, negligence or default on the part of the defendant in this case.

Your verdict in no event, however, may exceed the sum of $25,000, which sum is the maximum allowed by statute, and the amount—well, that's the maximum allowed by statute in this state.

Now, the net pecuniary or monetary loss, if any, sustained by the plaintiff by reason of the loss of her father is equivalent to the pecuniary or monetary benefits, if any, which the plaintiff might reasonably have expected to have received from a continuation of his life.

In assessing plaintiff's damages, if any, you should consider the age, health and condition of life of both the plaintiff and her deceased father, his habits of industry, his ability to earn money, his disposition to aid and assist plaintiff, the probable duration of the life of the plaintiff's deceased father, if he had not died as the result of the accident.

Now, in this connection, you are instructed that the life expectancy of Gary Lee Neely at the time of his decease was forty-three and ninety-nine hundredths years.

[fol. 72] The Court further instructs you that it is difficult to adduce direct evidence of the exact pecuniary or monetary loss occasioned the plaintiff by the death of her father, and you are permitted to determine the question of damages from your own observations, experience and knowledge, conscientiously applied to the facts and circumstances of this case.

In this connection, however, you are further instructed that you should not allow anything to the plaintiff by way of exemplary damages or the punishment of the defendant.

You are instructed that you should not be governed or influenced by sympathy for the plaintiff because Gary Neely lost his life in an accident, and you should not be governed or influenced by any prejudice or feeling, either in favor of or against the plaintiff or in favor of or against the defendant, but in arriving at your verdict in this case you should be governed solely by the evidence given from the witness stand and the instructions of the Court.

You, ladies and gentlemen, are the sole judges of the facts and credibility of the witnesses who have testified in this case, as I have previously told you.

In passing upon the credibility of any witness, you have a right to take into consideration his or her conduct or demeanor on the witness stand, his or her interest if any in the outcome of the case, the reasonableness or unreasonableness of the testimony given, its probability or lack of probability, the opportunities which the witness had to observe the facts concerning which he has given testimony, the consistency of statements upon the witness stand with those made at other times and places as shown by the evidence in the case.

All of these things you may take into consideration in passing upon the credibility of any witness who has testified in this case, and if you believe that any witness who has testified has wilfully testified falsely to any material matter, you are at liberty to disregard the whole or any part of that witness's testimony.

The instructions which I have given you, ladies and gentlemen, contain the law that will govern you in this case, and in determining the facts you should only consider evi- [fol. 73] dence given upon the trial. Evidence offered at trial and rejected by the Court and evidence stricken from the record by the Court should not be considered by you. The opening statements and arguments of counsel and the remarks of Court and counsel are not evidence. The arguments, statements and objections made by counsel to the Court or to each other and the rulings and orders made by the Court and remarks made by the Court and not directed

to you should not be considered by you in arriving at your verdict.

No single one of the instructions which I have given you contain all of the law, but they are related and should be taken and considered together by you as a whole.

I am sure you understand, ladies and gentlemen, that your verdict must be unanimous.

When you retire to your jury room, you will select one of your members as foreman of the Jury.

You will be furnished with two blank forms of verdict, one blank form for the plaintiff and one for the defendant. If you reach a verdict for the plaintiff, you should insert the amount of damages which you find plaintiff to be entitled to under the evidence in this case in the blank space which is set out for that purpose, and you should cause that verdict to be signed by your foreman. If you reach a verdict for the defendant, you should cause that verdict to be signed by your foreman.

In other words, ladies and gentlemen, you will only cause one of the verdicts to be signed by the foreman, and when you return to report your verdict you will return both the signed verdict, the unsigned verdict, together with any of the exhibits which you may take to your jury room for further examination.

Does the plaintiff have exceptions to instructions given?

At the Bench.

Mr. Kripke: May it please the Court, the plaintiff objects to all instructions which mention the words "contributory negligence" on the grounds that the issue of contributory negligence should not be submitted to this Jury, there being no evidence of such contributory negligence.

[fol. 74] Also, the plaintiff objects to the phrase to the effect that the defendant is not an insurer of the safety of the plaintiff on the ground that it is misleading. It injects insurance into this case in a strange backdoor fashion and generally is misleading in its terminology.

The Court: Defendant have any?

Mr. Mott: The defendant objects to the giving of any instructions to the Jury which would enable them to return a verdict for the plaintiff for the reasons given in support of defendant's motion for directed verdict at the close of plaintiff's case and at the close of all the evidence.

The defendant objects to the instruction by the Court to the effect that the defendant had a duty toward the plaintiff, since that is not the law.

Also, to that portion of the damage instructions wherein the care, guidance and so forth of the decedent are mentioned.

The Court: That was changed.

Mr. Mott: I will withdraw that. I didn't hear it right. I believe that's all.

In Open Court.

The Court: Will the Marshal come forward and be sworn, please?

(The Marshal was sworn. The Marshal and the Jury withdrew.)

The Court: The court will be in recess, subject to call.

(Whereupon, the court was recessed at 3:35 o'clock p.m.)

(A verdict for the plaintiff was returned at 4:20 o'clock p.m.)

Filed May 26, 1964.

[fol. 75] Clerk's Certificates (omitted in printing).

[fol. 80] Minute entry of argument and submission—January 4, 1965 (omitted in printing).

[fol. 81]

IN THE UNITED STATES COURT OF APPEALS.

TENTH CIRCUIT

No. 7796—March Term—1965

MARTIN K. EBY CONSTRUCTION CO., INC., Appellant,

vs.

SANDRA LEE NEELY, by her legal representative and guardian, Cecile V. Neely, Appellee.

Appeal From the United States District Court for the District of Colorado.

John C. Mott of McComb, Zarlengo and Mott, Denver, Colorado, for Appellant;

Kenneth M. Kripke of Kripke & Friedman, Denver, Colorado, for Appellee.

OPINION—Filed April 26, 1965

Before PICKETT, HILL and SETH, Circuit Judges.

PICKETT, Circuit Judge.

[fol. 82] This is a diversity action brought by the Guardian of Sandra Lee Neely, a minor, to recover damages from Martin K. Eby Construction Company, Inc. for the alleged wrongful death of her father, Gary Lee Neely. It was alleged that Neely's death was proximately caused by Eby's negligence in the construction, maintenance and supervision of a scaffold, or platform, located in a missile silo being constructed near Elizabeth, Colorado for the United States. Eby admitted the death of Neely, but denied that it was negligent or that its acts were the proximate cause of Neely's death.

The case was tried to a jury. At the close of plaintiff's evidence and again at the close of all of the evidence, defen-

dant moved for a directed verdict in its favor, alleging, among other things, that there was no evidence of negligence on its part, that there was no evidence tending to show that anything it did, or failed to do, proximately caused Neely's death, and that there was no evidence that it breached any duty owing to Neely. Both motions were overruled and the case submitted to the jury, which returned a verdict in favor of plaintiff in the sum of $25,000. Thereafter defendant filed a motion for judgment notwithstanding the verdict in accordance with its motions for directed verdict or, in the alternative, for a new trial. The trial court denied the motions and entered judgment on the verdict in favor of plaintiff. The dispositive question presented here is whether the plaintiff's evidence was sufficient [fol. 83] to go to the jury on the issue of negligence and proximate cause.

The missile silo in question was being constructed and equipped by several different contractors. It is a cylindrical structure approximately 50 feet in diameter and 130 to 140 feet in depth. For construction purposes, it was divided into four Quadrants as follows: Quadrant I—the southeast one-fourth of the silo; Quadrant II—the northeast one-fourth; Quadrant III—the northwest one-fourth; and Quadrant IV—the southwest one-fourth. A square steel framework, called a "crib" is located inside the silo and it forms the frame within which the launcher rides up and down. Outside of the crib are two counterweights. These counterweights are between the crib and the silo's outer wall. One of them is located in each of Quadrants II and III, or the northeast and northwest portions of the silo. The counterweights are of an odd shape so as to conform with and fit between the straight side of the steel crib and the rounded outer wall of the silo, and slide up and down, as the launcher moves, within a system of fixed rigid rails. The launcher system is an elevator mounted within vertical rails, by which the missile is raised from its underground storage position to its firing position. Its movements are controlled and stabilized by the counterweights which go down as the launcher rises, and vice versa. The scaffolding

and platforms required during the course of construction were furnished and built by Eby as a subcontractor on the [fol. 84] project. Neely's employer was also a subcontractor, whose contract provided that it would furnish the engineering services and also the work done by the millwrights and other craftsmen who were employed by yet another contractor. Construction on the site was almost completed at the time Neely fell to his death from a platform which had been built near the top of the silo by employees of Eby. There remained to be done only the testing of the launcher system and the installation of the missile itself.

Sometime prior to the testing, Eby's carpenters had constructed a wooden platform between the counterweights which was to be used by those engaged in making the tests. The day silo captain, or millwright foreman, Blanchard, discovered that it was too large and interfered with the measurements that had to be taken from a drive locking mechanism at the bottom of the silo and the counterweight locking mechanism located about 6 feet below the top of the silo. He decided that the platform would have to be modified, and directed Eby's foreman to make the necessary changes so that the measurements could be made without interference from it. The platform was about two feet above the counterweights and after the changes had been made it did not cover the entire space between the counterweights. After the modifications had been made, Blanchard told the millwrights that they could begin making the critical measurements. At about the time the measurements were to be made, Blanchard observed his fellow employee, [fol. 85] Neely, who was the night silo captain, standing on the platform. He asked Neely how things were going and Neely replied "everything is under control." Blanchard also testified that when he left the area it was well lighted, that he could see the counterweights and the platform as well as the space between them, and that the platform was on the level requested by him in his directions to Eby's foreman. The evidence is clear that the platform, both before and after the modification or reconstruction, was

located in the same place. It extended in a north-south direction from the steel crib to the outer wall of the silo, and was supported on the south end by I-beams which were a permanent part of the steel crib. The north end rested on water pipes which were permanently fixed along the outer silo wall. The platform was between the two counterweights so that, facing north from the center of the silo, the one in Quadrant II was east and the one in Quadrant III was west of it. The platform was not more than two feet above the counterweights, on a vertical plane because of the fixed positions of the I-beams and water pipes, and it was one or two feet away from each counterweight, on a horizontal plane. There was a railing on the platform that commenced about 3 feet from the steel crib and ran along the Quadrant II, or east side, and continued along the end next to the outer wall. There was no railing along the Quadrant III, or west side, of the platform.

In addition to Neely, there were three other men engaged in making the measurements. It was Neely's duty to record [fol. 86] the measurements when made by the others. To make the measurements, it was necessary that the four men be on top of the counterweight. Each of them stepped, or jumped, from the platform to the counterweight in Quadrant III, and completed the measurements there. Wilhoit, one of the four men, testified that he then proceeded from that counterweight to the platform, walked across it, stepped on the steel crib through the opening left in the rail there, walked along the steel crib, and then jumped over onto the top of the Quadrant II counterweight. His testimony as to what happened next is as follows: "I took hold of the cables that is coming into the counterweight with my right hand. I turned for a minute to see if my buddy and Mr. Neely were coming over at that time to help with this one, if they were ready. Just as I turned, I saw Mr. Neely coming across the scaffolding, and I didn't keep an eye right on him at the time. I just looked to see if they were coming. I took my safety belt and snapped it around, which it has a cable on it, snapped it around the cables and snapped it on my other side. Just as I did that, I just hap-

pened to glance up and saw Mr. Neely coming head first by the counterweight. With my left hand I made a grab and grabbed the back of his shirt. With a sudden jerk his shirt flipped out of my hand and he proceeded down." Wilhoit was the only witness who saw Neely fall. The other two workmen who were present were not called to testify, and there was no other evidence of the cause of the accident. [fol. 87] A trial court in this circuit has the duty to direct a verdict "where the evidence is without dispute or is conflicting but of such a conclusive nature that if a verdict were returned for the plaintiff or defendant, as the case may be, the exercise of sound judicial discretion would require that it be set aside." Mutual Life Ins. Co. of New York v. Bohlman, 10 Cir., 328 F.2d 289, 295, and cases cited therein. Auto Transports, Inc. v. Hinman, 10 Cir., 332 F.2d 553; United States v. Oklahoma City Retailers Ass'n, 10 Cir., 331 F.2d 328. We think the motion for a directed verdict in favor of Eby should have been granted.

Viewing the evidence in the light most favorable to the plaintiff, it establishes only that on the day in question Eby's employees were directed to modify a platform or scaffolding so that it would not interfere with certain critical measurements that had to be made within the silo;[1] and that Eby's employees made the necessary changes. Neely and three other men began to take the measurements and had completed those on the Quadrant III counterweight; as they were moving over to take the measurements of the Quadrant II counterweight, Neely was observed coming across the platform, and the next thing that is known is that he was falling into the silo. There is no evidence of the cause of Neely's fall. The uncontradicted evidence does show that the platform did not break, that the railing did not break, and that there were no grease spots on the plat- [fol. 88] form upon which he might have slipped. In short, the most that the evidence establishes is that Neely was on a platform constructed by Eby's employees at the time he fell.

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[1] The measurements required the use of a plumb bob which could not be made without a narrowing of the platform.

It is a fundamental rule of law that the burden is upon the one asserting negligence to prove it by a preponderance of the evidence, and such burden is not sustained by evidence that is surmise, speculation or conjecture. Letts v. Iwig, (Colo. 1963), 384 P.2d 726; Perry Lumber Co. v. Ruybal, 133 Colo. 502, 297 P.2d 531; Gordon v. Clotsworthy, 127 Colo. 377, 257 P.2d 410; Coakley v. Hayes, 121 Colo. 303, 215 P.2d 901. The burden is not met in Colorado by the showing of the mere happening of an accident or the occurrence of an injury. Remley v. Newton, 147 Colo. 401, 364 P.2d 581; Drake v. Lerner Shops of Colo, Inc., 145 Colo. 1, 357 P.2d 624; Perry Lumber Co. v. Ruybal, supra.

It is, of course, the rule that negligence may be established by the facts and circumstances surrounding the accident or injury. Remley v. Newton, supra. In reliance upon this rule, appellee points out that the platform, as reconstructed, did not extend to the counterweights, but was one or two feet from the edges, and contained a railing along most of the east side and the north end. Appellee also points out that under the testimony, Neely could only get to the Quadrant II counterweight either by climbing over the railing or by going along the route taken by Wilhoit. It argues that from these circumstances the jury could infer negli- [fol. 89] gence in that the platform was too small and the railing should not have been there. However, there is no evidence from which it could be inferred that the size of the platform caused Neely to fall. Nor is there any evidence to show that the railing was unnecessary or that it should not have been placed there. However, assuming for the sake of argument that the jury could by inference find negligence on the part of Eby in that the platform was too small and the railing unnecessary, it by no means follows that appellee is entitled to recover upon such proof. Under Colorado law, proof of negligence alone is not sufficient to impose liability. There must also be proof that the negligence was the proximate cause of the injury. Perry Lumber Co. v. Ruybal, supra; Maloney v. Jussel, 125 Colo. 125, 241 P.2d 862; Clark v. Wallace, 51 Colo. 437, 118 P. 973; Kent Mfg. Co. v. Zimmerman, 48 Colo. 388, 110 P. 187. Proximate cause is that which in natural and continued

sequence, unbroken by any efficient, intervening cause, produced the result complained of and without which that result would not have occurred. Hook v. Lakeside Park Co., 142 Colo. 277, 351 P.2d 261; Stout v. Denver Park & Amusement Co., 87 Colo. 294, 287 P. 650; Town of Lyons v. Watt, 43 Colo. 238, 95 P. 949. In Mosko v. Walton, 144 Colo. 602, 358 P.2d 49, 52, the Colorado Supreme Court stated the rule as follows:

> "Their negligent act or omission must have been such that without it the injury would not have occurred. * * * The rule of proximate cause requires proof that but for [fol. 90] the defendants' negligence, the damage would not have occurred. * * * Where the evidence, as here, presents no more than an equal choice of probabilities, it is not substantial. * * * 'No number of mere possibilities will establish a probability.' * * * "

Proximate cause is ordinarily a question of fact for the jury, but where the facts are undisputed, it becomes a question of law for the court. Stout v. Denver Park & Amusement Co., supra; Clark v. Wallace, supra. In this case, the undisputed facts show a total lack of competent evidence to connect the fall by Neely with the alleged negligence on Eby's part. There is no adequate showing of a causal connection between the alleged smallness of the platform or the location of the railing or the lack of additional railings, and Neely's fall. It may, of course, be conceded that the platform might possibly have had something to do with his fall, but there is nothing in the record to show what it was.

We conclude that the record wholly fails to disclose sufficient evidence to establish either negligence on Eby's part or, assuming such negligence, that it was the proximate cause of Neely's death.

Reversed, with instructions to dismiss the action.

[File endorsement omitted]

[fol. 91]

IN UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JUDGMENT—April 26th, 1965

Before Honorable John C. Pickett, Honorable Delmas C. Hill and Honorable Oliver Seth, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Colorado and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby reversed, that this cause be and the same is hereby remanded to the said district court with instructions to dismiss the action, and that Martin K. Eby Construction Co., Inc., appellant, have and recover of and from Sandra Lee Neely, by her legal representative and guardian, Cecile V. Neely, appellee, its costs herein.

[On June 1, 1965, the mandate of the United States Court of Appeals, in accordance with the opinion and judgment of said court, was issued to the United States District Court for the District of Colorado.]

[fol. 92] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 93]

SUPREME COURT OF THE UNITED STATES

No. 383, October Term, 1965

SANDRA LEE NEELY, etc., Petitioner,

v.

MARTIN K. EBY CONSTRUCTION CO., INC.

ORDER ALLOWING CERTIORARI—November 15, 1965

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted and the case is placed on the summary calendar. In addition to all the questions presented by the petition, counsel are requested to brief and discuss at oral argument the following questions:

"1. Whether the Court of Appeals, after deciding that respondent should have been granted a judgment n.o.v., had power under Rule 50 of the Federal Rules of Civil Procedure and our decisions in Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212; Blo Globe Liquor Co. v. San Roman, 332 U.S. 571; and Weade v. Dichmann, Wright & Pugh, 337 U.S. 801, to order the case dismissed and thereby deprive petitioner of any opportunity to invoke the trial court's discretion on the issue of whether petitioner should have a new trial?

"2. Whether the Court of Appeals erred in ordering the District Court not merely to enter a judgment n.o.v. for respondent but to dismiss plaintiff's case in view of [fol. 94] Rule 50(c)(2) of the Federal Rules of Civil Procedure which gives a party whose verdict has been set aside the right to make a motion for a new trial not later than 10 days after entry of the judgment notwithstanding the verdict?"

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. [redacted] 12

SANDRA LEE NEELY, by her legal representative and guardian, Cecile V. Neely,

Petitioner,

vs.

MARTIN K. EBY CONSTRUCTION CO., INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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OCTOBER TERM, 1965

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SANDRA LEE NEELY, by her legal representative and guardian, Cecile V. Neely,

Petitioner,

vs.

MARTIN K. EBY CONSTRUCTION CO., INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the Tenth Circuit in action #7796 entered on April 26, 1965. The opinion appears in the appendix to this petition. That judgment reversed a judgment in favor of the plaintiff (petitioner here) on a jury verdict obtained in the United States District Court for the District of Colorado.

BASIS OF JURISDICTION

Jurisdiction of the Supreme Court is invoked under Title 28, United States Code, Sec. 1254(1). Review is sought from judgment of the Court of Appeals of the Tenth Circuit in action #7796 entered on April 26, 1965 but as yet unreported.

QUESTION PRESENTED

Do Rules 50(d) and 38(a) Federal Rules of Civil Procedure and the Seventh Amendment to the Constitution of the United States preclude the Court of Appeals from instructing the trial court to dismiss an action wherein the trial court denied the defendant's motions for new trial and for judgment notwithstanding the verdict and entered judgment for the plaintiff?

CONSTITUTIONAL PROVISIONS AND FEDERAL RULES INVOLVED

Rule 50(d) Federal Rules of Civil Procedure, effective July 1, 1963, provides as follows:

> If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment nothwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

Rule 38(a) Federal Rules of Civil Procedure, provides as follows:

> The right of trial by jury as declared by the Seventh Amendment to the Constitution or as

given by a statute of the United States shall be preserved to the parties inviolate.

Seventh Amendment to the United States Constitution provides as follows:

> Jury trial in civil action.—In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law.

STATEMENT

The minor plaintiff, acting through her legal representative, brought an action for damages for the wrongful death of her father while he was working as an engineer in the erection of a missile launching silo in Colorado. Jurisdiction of the trial court was based upon diversity of citizenship and an amount in controversy in excess of $10,000 exclusive of costs and interests as provided by Title 28, United States Code, Sec. 1332.

The plaintiff claimed that her father died as a direct result of a fall from a certain wooden scaffold or platform and that his fall was the proximate result of the negligence of the defendant in the erection, maintenance and supervision of that scaffold or platform. A federal jury awarded her the sum of $25,000 damages, this being the maximum award permissible under Colorado's wrongful death statute. The defendant filed a motion for judgment notwithstanding the verdict in accordance with a motion for directed verdict previously made, and, in the alternative, the defendant moved for a new trial. The trial court denied both motions and entered judgment on the verdict in favor of the plaintiff (petitioner here). The defendant (respondent here) appealed to the Court of Appeals which reversed the action with instructions to the trial court to dismiss.

ARGUMENT

This is a matter of first impression. Research by petitioner's attorneys fails to reveal a single instance wherein the new Rule 50(d) has been interpreted.

The Court of Appeals exceeded its statutory and constitutional powers by ordering this action dismissed. If the Court of Appeals was right in its conclusion that neither negligence nor proximate cause were present, then that Court had certain powers which it could employ: It could (1) reverse with instructions to order a new trial, or (2) it could reverse with instructions to the trial court to determine whether or not a new trial should be granted.

The petitioner does not concede for one moment that the trial court and the jury were wrong and that the appellate court was right in interpreting the evidence as to proximate cause and negligence. But the thrust of this argument is that once the jury has returned its verdict and the trial court (in this case the Honorable Alfred A. Arraj, presiding judge of the United States District Court for the District of Colorado) has denied the motions for new trial and judgment notwithstanding the verdict, then the appellate court is without power to substitute its interpretation of the facts for the interpretation of the jury.

It will be observed that the entire opinion of the Court of Appeals consists of an interpretation, from the cold transcript, of the facts developed at the trial. When the Court of Appeals concludes from its recital of the evidence that "There is no evidence of the cause of Neely's fall" the Court is doing exactly what the Constitution of the United States forbids: It is re-examining in a way repugnant to the common law, facts tried to a jury in a civil action at common law where the value in controversy exceeds twenty dollars.

The trial judge and the jury were present during the entire trial of this action. They were in a far better position than was the appellate court to observe the witnesses as

they testified and to appraise at first hand the evidence as it was presented. The petitioner believes that Rule 50(d), so recently enacted, was an attempt by the Supreme Court to delineate for the Courts of Appeals what they could and could not do in the precise situation which exists in this controversy. At the very least, the appellate court must give to the trial court the final decision as to whether or not the originally successful party should be given another chance to prove his case.

CONCLUSION

Litigants and lower courts throughout the United States must be told the extent to which verdicts are protected or jeopardized by the newly enacted Rule 50(d). The petitioner therefore respectfully prays that her petition for a writ of certiorari be granted and for such other and further relief as the Court may deem appropriate.

Respectfully submitted,

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Attorneys for petitioners

PROOF OF SERVICE

I, Charles A. Friedman, one of the attorneys for petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 21st day of July, 1965, I served a copy of the foregoing petition on John C. Mott, Esq., McComb, Zarlengo & Mott, attorneys for respondent, by mailing a copy in a duly addressed envelope with proper postage prepaid, to John C. Mott, Esq., McComb, Zarlengo & Mott, attorneys at law, American National Bank Building, 17th and Stout Streets, Denver, Colorado, 80202.

Charles A. Friedman

OPINION

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 7796 — March Term — 1965

MARTIN K. EBY CONSTRUCTION CO., INC., *Appellant.*

vs.

SANDRA LEE NEELY, by her legal representative and guardian, Cecile V. Neely, *Appellee.*

Appeal From the United States District Court For The District of Colorado.

April 26, 1965

Before PICKETT, HILL and SETH, Circuit Judges.

PICKETT, Circuit Judge.

This is a diversity action brought by the Guardian of Sandra Lee Neely, a minor, to recover damages from Martin K. Eby Construction Company, Inc., for the alleged wrongful death of her father, Gary Lee Neely. It was alleged that Neely's death was proximately caused by Eby's negligence in the construction, maintenance and supervision of a scaffold, or platform, located in a missile silo being constructed near Elizabeth, Colorado for the United States. Eby admitted the death of Neely, but denied that it was negligent or that its acts were the proximate cause of Neely's death.

The case was tried to a jury. At the close of plaintiff's evidence and again at the close of all of the evidence, defendant moved for a directed verdict in its favor, alleging, among other things, that there was no evidence of negligence on its part, that there was no evidence tending to show that

anything it did, or failed to do, proximately caused Neely's death, and that there was no evidence that it breached any duty owing to Neely. Both motions were overruled and the case submitted to the jury, which returned a verdict in favor of plaintiff in the sum of $25,000. Thereafter defendant filed a motion for judgment notwithstanding the verdict in accordance with its motions for directed verdict or, in the alternative, for a new trial. The trial court denied the motions and entered judgment on the verdict in favor of plaintiff. The dispositive question presented here is whether the plaintiff's evidence was sufficient to go to the jury on the issue of negligence and proximate cause.

The missile silo in question was being constructed and equipped by several different contractors. It is a cylindrical structure approximately 50 feet in diameter and 130 to 140 feet in depth. For construction purposes, it was divided into four Quadrants as follows: Quadrant I—the southeast one-fourth of the silo; Quadrant II—the northeast one-fourth; Quadrant III—the northwest one-fourth; and Quadrant IV—the southwest one-fourth. A square steel framework, called a "crib" is located inside the silo and it forms the frame within which the launcher rides up and down. Outside of the crib are two counterweights. These counterweights are between the crib and the silo's outer wall. One of them is located in each of Quadrants II and III, or the northeast and northwest portions of the silo. The counterweights are of an odd shape so as to conform with and fit between the straight side of the steel crib and the rounded outer wall of the silo, and slide up and down, as the launcher moves, within a system of fixed rigid rails. The launcher system is an elevator mounted within vertical rails, by which the missile is raised from its underground storage position to its firing position. Its movements are controlled and stabilized by the counterweights which go down as the launcher rises, and vice versa. The scaffolding and platforms required during the course of construction were furnished and built by Eby as a subcontractor on the project. Neely's employer was also a subcontractor, whose contract provided that it would furnish the engineering services and

also the work done by the millwrights and other craftsmen who were employed by yet another contractor. Construction on the site was almost completed at the time Neely fell to his death from a platform which had been built near the top of the silo by employees of Eby. There remained to be done only the testing of the launcher system and the installation of the missile itself.

Sometime prior to the testing, Eby's carpenters had constructed a wooden platform between the counterweights which was to be used by those engaged in making the tests. The day silo captain, or millwright foreman, Blanchard, discovered that it was too large and interfered with the measurements that had to be taken from a drive locking mechanism at the bottom of the silo and the counterweight locking mechanism located about 6 feet below the top of the silo. He decided that the platform would have to be modified, and directed Eby's foreman to make the necessary changes so that the measurements could be made without interference from it. The platform was about two feet above the counterweights and after the changes had been made it did not cover the entire space between the counterweights. After the modifications had been made, Blanchard told the millwrights that they could begin making the critical measurements. At about the time the measurements were to be made, Blanchard observed his fellow employee, Neely, who was the night silo captain, standing on the platform. He asked Neely how things were going and Neely replied "everything is under control." Blanchard also testified that when he left the area it was well lighted, that he could see the counterweights and the platform as well as the space between them, and that the platform was on the level requested by him in his directions to Eby's foreman. The evidence is clear that the platform, both before and after the modification or reconstruction, was located in the same place. It extended in a north-south direction from the steel crib to the outer wall of the silo, and was supported on the south end by I-beams which were a permanent part of the steel crib. The north end rested on water pipes which were permanently fixed along the outer silo wall. The platform

was between the two counterweights so that, facing north from the center of the silo, the one in Quadrant II was east and the one in Quadrant III was west of it. The platform was not more than two feet above the counterweights, on a vertical plane because of the fixed positions of the I-beams and water pipes, and it was one or two feet away from each counterweight, on a horizontal plane. There was a railing on the platform that commenced about 3 feet from the steel crib and ran along the Quadrant II, or east side, and continued along the end next to the outer wall. There was no railing along the Quadrant III, or west side, of the platform.

In addition to Neely, there were three other men engaged in making the measurements. It was Neely's duty to record the measurements when made by the others. To make the measurements, it was necessary that the four men be on top of the counterweight. Each of them stepped, or jumped, from the platform to the counterweight in Quadrant III, and completed the measurements there. Wilhoit, one of the four men, testified that he then proceeded from that counterweight to the platform, walked across it, stepped on the steel crib through the opening left in the rail there, walked along the steel crib, and then jumped over onto the top of the Quadrant II counterweight. His testimony as to what happened next is as follows: "I took hold of the cables that is coming into the counterweight with my right hand. I turned for a minute to see if my buddy and Mr. Neely were coming over at that time to help with this one, if they were ready. Just as I turned, I saw Mr. Neely coming across the scaffolding, and I didn't keep an eye right on him at the time. I just looked to see if they were coming. I took my safety belt and snapped it around, which it has a cable on it, snapped it around the cables and snapped it on my other side. Just as I did that, I just happened to glance up and saw Mr. Neely coming head first by the counterweight. With my left hand I made a grab and grabbed the back of his shirt. With a sudden jerk his shirt flipped out of my hand and he proceeded down." Wilhoit was the only witness who saw Neely fall. The other two workmen who were present

were not called to testify, and there was no other evidence of the cause of the accident.

A trial court in this circuit has the duty to direct a verdict "where the evidence is without dispute or is conflicting but of such a conclusive nature that if a verdict were returned for the plaintiff or defendant, as the case may be, the exercise of sound judicial discretion would require that it be set aside." Mutual Life Ins. Co. of New York v. Bohlman, 10 Cir., 328 F.2d 289, 295, and cases cited therein. Auto Transports, Inc. v. Hinman, 10 Cir., 332 F.2d 553; United States v. Oklahoma City Retailers Ass'n., 10 Cir., 331 F.2d 328. We think the motion for a directed verdict in favor of Eby should have been granted.

Viewing the evidence in the light most favorable to the plaintiff, it establishes only that on the day in question Eby's employees were directed to modify a platform or scaffolding so that it would not interfere with certain critical measurements that had to be made within the silo;[1] and that Eby's employees made the necessary changes. Neely and three other men began to take the measurements and had completed those on the Quadrant III counterweight; as they were moving over to take the measurements of the Quadrant II counterweight, Neely was observed coming across the platform, and the next thing that is known is that he was falling into the silo. There is no evidence of the cause of Neely's fall. The uncontradicted evidence does show that the platform did not break, that the railing did not break, and that there were no grease spots on the platform upon which he might have slipped. In short, the most that the evidence establishes is that Neely was on a platform constructed by Eby's employees at the time he fell.

It is a fundamental rule of law that the burden is upon the one asserting negligence to prove it by a preponderance of the evidence, and such burden is not sustained by evidence that is surmise, speculation or conjecture. Letts v. Iwig, (Colo. 1963), 384 P.2d 726; Perry Lumber Co. v. Ruybal,

[1] The measurements required the use of a plumb bob which could not be made without a narrowing of the platform.

133 Colo. 502, 297 P.2d 531; Gordon v. Clotsworthy, 127 Colo. 377, 257 P.2d 410; Coakley v. Hayes, 121 Colo. 303, 215 P.2d 901. The burden is not met in Colorado by the showing of the mere happening of an accident or the occurrence of an injury. Remley v. Newton, 147 Colo. 401, 364 P.2d 581; Drake v. Lerner Shops of Colo. Inc., 145 Colo. 1, 357 P.2d 624; Perry Lumber Co. v. Ruybal, supra.

It is, of course, the rule that negligence may be established by the facts and circumstances surrounding the accident or injury. Remley v. Newton, supra. In reliance upon this rule, appellee points out that the platform, as reconstructed, did not extend to the counterweights, but was one or two feet from the edges, and contained a railing along most of the east side and the north end. Appellee also points out that under the testimony, Neely could only get to the Quadrant II counterweight either by climbing over the railing or by going along the route taken by Wilhoit. It argues that from these circumstances the jury could infer negligence in that the platform was too small and the railing should not have been there. However, there is no evidence from which it could be inferred that the size of the platform caused Neely to fall. Nor is there any evidence to show that the railing was unnecessary or that it should not have been placed there. However, assuming for the sake of argument that the jury could by inference find negligence on the part of Eby in that the platform was too small and the railing unnecessary, it by no means follows that appellee is entitled to recover upon such proof. Under Colorado law, proof of negligence alone is not sufficient to impose liability. There must also be proof that the negligence was the proximate cause of the injury. Perry Lumber Co. v. Ruybal, supra; Maloney v. Jussel, 125 Colo. 125, 241 P.2d 862; Clark v. Wallace, 51 Colo. 437, 118 P. 973; Kent Mfg. Co. v. Zimmerman, 48 Colo. 388, 110 P. 187. Proximate cause is that which, in natural and continued sequence, unbroken by any efficient, intervening cause, produced the result complained of and without which that result would not have occurred. Hook v. Lakeside Park Co., 142 Colo. 277, 351 P.2d 261; Stout v. Denver Park & Amusement Co., 87 Colo. 294, 287 P.

650; Town of Lyons v. Watt, 43 Colo. 238, 95 P. 949. In Mosko v. Walton, 144 Colo. 602, 358 P.2d 49, 52, the Colorado Supreme Court stated the rule as follows:

> "Their negligent act or omission must have been such that without it the injury would not have occurred.' * * * The rule of proximate cause requires proof that but for the defendants' negligence, the damage would not have occurred. * * * Where the evidence, as here, presents no more than an equal choice of probabilities, it is not substantial. * * * 'No number of mere possibilities will establish a probability.' * * *"

Proximate cause is ordinarily a question of fact for the jury, but where the facts are undisputed, it becomes a question of law for the court. Stout v. Denver Park & Amusement Co., supra; Clark v. Wallace, supra. In this case, the undisputed facts show a total lack of competent evidence to connect the fall by Neely with the alleged negligence on Eby's part. There is no adequate showing of a causal connection between the alleged smallness of the platform or the location of the railing or the lack of additional railings, and Neely's fall. It may, of course, be conceded that the platform might possibly have had something to do with his fall, but there is nothing in the record to show what it was.

We conclude that the record wholly fails to disclose sufficient evidence to establish either negligence on Eby's part or, assuming such negligence, that it was the proximate cause of Neely's death.

REVERSED, with instructions to dismiss the action.

JUDGMENT

Twenty-First Day, March Term, Monday, April 26th, 1965.

Before Honorable John C. Pickett, Honorable Delmas C. Hill and Honorable Oliver Seth, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Colorado and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby reversed, that this cause be and the same is hereby remanded to the said district court with instructions to dismiss the action, and that Martin K. Eby Construction Co., Inc., appellant, have and recover of and from Sandra Lee Neely, by her legal representative and guardian, Cecile V. Neely, appellee, its costs herein.

[On June 1, 1965, the mandate of the United States Court of Appeals, in accordance with the opinion and judgment of said court, was issued to the United States District Court for the District of Colorado.]

CLERK'S CERTIFICATE

United States Court of Appeals, Tenth Circuit.

I, Robert B. Cartwright, Clerk of the United States Court of Appeals for the Tenth Circuit, do hereby certify the foregoing as a full, true, and complete copy of the designated transcript of the record from the United States District Court for the District of Colorado, and full, true, and complete copies of certain pleadings, record entries and proceedings, including the opinion (except full captions, of the Supreme Court of the United States) had and filed titles and endorsements omitted in pursuance of the rules in the United States Court of Appeals for the Tenth Circuit in a certain cause in said United States Court of Appeals, No. 7796, wherein Martin K. Eby Construction Co., Inc. was appellant and Sandra Lee Neely, by her legal representative and guardian, Cecile V. Neely, was appellee.

I do further certify that the original transcript of the record filed herein remained on file herein until June 1, 1965, at which said time the said original transcript of the record was returned to the United States District Court for the District of Colorado.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Court of Appeals for the Tenth Circuit, at my office in Denver, Colorado, this 15th day of June, 1965.

ROBERT B. CARTWRIGHT

SEAL .....

Clerk of the United States Court of Appeals, Tenth District.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1965

No. [redacted] 12

Steven Lee Nunn, by his legal representative and guardian, Cecile V. Nesly,
Petitioner,

vs.

Martin K. Eby Construction Co., Inc.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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CITATIONS

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 383

SANDRA LEE NEELY, by her legal representative and guardian, Cecile V. Neely,
Petitioner,

vs.

MARTIN K. EBY CONSTRUCTION CO., INC.;
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

I. OPINIONS BELOW

Neither the judgment of the District Court nor the opinion of the Court of Appeals for the Tenth Circuit (App. to Petition) are as yet reported.

II. JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

III. QUESTION PRESENTED

Whether the statutory power of the Court of Appeals to reverse and set aside judgments brought before it for review is limited by the provisions of Rules 50 (d) and 38 (a) Federal Rules of Civil Procedure and the Seventh Amendment to the Constitution of the United States, so as to prevent the Court of Appeals here from reversing the jury verdict and judgment of the District Court and remanding the case to said court with instructions to dismiss the action.

IV. CONSTITUTIONAL PROVISIONS, FEDERAL STATUTES AND FEDERAL RULES INVOLVED

The pertinent provisions of Rules 38 (a) and 50 (d) Federal Rules of Civil Procedure as well as the pertinent provisions of the Seventh Amendment to the United States Constitution are set forth in the Petition at pp. 2 and 3.

The pertinent portions of the Judicial Code of 1948 (62 Stat. 963, 28 U.S.C. 2106) provide as follows:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances. June 25, 1948, c. 646, 62 Stat. 963."

V. STATEMENT

The action below was brought by petitioner to recover damages for the alleged wrongful death of her father in an accident which took place inside a missile silo being constructed in the State of Colorado. Petitioner alleged that the death of her father was proximately caused by the negligence of respondent in the erection, maintenance and supervision of a certain platform located in said silo and from which her father fell to his death. Respondent made appropriate motions in the trial court for directed verdict at the close of petitioner's evidence and again at the close of all the evidence, alleging in substance that there was no evidence of negligence on its part and that petitioner had failed to establish that any act or omission on the part of respondent proximately caused the accident in question. Both motions were denied. A Federal jury awarded petitioner damages in the sum of $25,000.00.

Respondent then filed a Motion for Judgment Notwithstanding the Verdict or in the alternative for a New Trial. Both motions were denied and judgment was entered on the jury's verdict.

Respondent then appealed to the Court of Appeals, which court reversed the action and remanded the same to the trial court with instructions to dismiss the same. Basis for the ruling by the Court of Appeals was that the record wholly failed as a matter of law to establish either evidence of negligence on the part of respondent or the proximate cause of the death of petitioner's father. The trial court complied with the mandate of the Court of Appeals.

Petitioner did not, as appellee in the Court of Appeals, assert any grounds entitling her to a new trial in

the event said court concluded that the trial court erred in denying respondent's Motion for Judgment Notwithstanding the Verdict.

Petitioner did not, at any time subsequent to the entry of judgment by the Court of Appeals, request said court on Petition for Rehearing or otherwise, to modify its judgment in any respect.

The only relief requested or prayed for by petitioner in her brief in the Court of Appeals was that the judgment of the trial court be affirmed. No request whatsoever was therein made relative to the possible granting of a new trial. (Page 16 of Brief of Appellee.)

VI. SUMMARY OF ARGUMENT

The issue in the present case is extremely narrow, and petitioner's cryptic and entirely unsupported attempt to read into the provisions of Rule 50(d) something which is not there in no way warrants review by this Court on Certiorari.

The Court of Appeals unquestionably has the statutory power to review judgments of the District Court lawfully brought before it, to reverse and set aside such judgments, and on remand to direct the District Court to enter such judgments as the Court of Appeals may direct. If this were not so, the Court of Appeals would not be an appellate court at all.

Rule 50(d) neither limits nor restricts the appellate powers of the Court of Appeals. It contains no words of prohibition or restriction whatsoever insofar as the powers

of the Court of Appeals are concerned. The only words in Rule 50(d) which in any way refer to the Court of Appeals enlarge rather than restrict the powers of said court. The remaining words in Rule 50(d) confer certain rights upon an appellee in the Court of Appeals, which rights the petitioner here made no attempt to exercise.

At no stage of the proceedings below did petitioner seek to avail herself of the provisions of Rule 50(d); nor did petitioner at any time request the Court of Appeals to make any rulings whatsoever with regard to a new trial as provided for in said rule. Having failed to do so, petitioner has no basis to complain of the action of the Court of Appeals for the first time here.

The action of the Court of Appeals in ordering dismissal of the case in no way deprives petitioner of her constitutional right to a trial by jury.

VII. ARGUMENT

A. *The Decision Below is Clearly Correct.* After a detailed analysis of the evidence produced by petitioner in the trial court, the Court of Appeals, after first conceding that proximate cause is ordinarily a question of fact for the jury, ruled *as a matter of law* that petitioner had failed to establish a causal connection between any proven act or omission on the part of respondent and the death of petitioner's decedent; that the trial court should have granted respondent's timely Motion for Judgment Notwithstanding the Verdict; and the action should be dismissed. The soundness of this ruling is amply borne out by the record, and more especially since, as the Court of Appeals pointed out (Page v. of Appendix to Petition)

the evidence was without dispute, and established nothing more than that petitioner's decedent was on a platform constructed by respondent at the time he fell, there being no evidence as to the cause of the fall.

B. *There is No Conflict of Decision.* Since petitioner concedes (Page 4 of the Petition) that to her attorney's knowledge, Rule 50(d) has not been interpreted by any court, she has no standing to seek review here on the basis of conflict of decision.

C. *Rule 50(d) Does Not Limit the Appellate Powers of the Court of Appeals.* The only point which petitioner attempts to make is that the provisions of Rule 50(d) prevent the Court of Appeals — or for that matter any court of appellate jurisdiction, from reversing a judgment of a lower court and directing said lower court to dismiss the action. In other words, what petitioner is saying is that the Court of Appeals had only three alternatives: (1) to affirm the judgment of the trial court; (2) to order the trial court to grant a new trial; or (3) to order the trial court to itself determine whether a new trial should be granted.

In the first place, Rule 50(d) contains no such language. It contains not one word of limitation insofar as the power of the Court of Appeals is concerned. The only language contained in Rule 50(d) which even mentions the appellate court is the following: (Page 2 of the Petition)

> ". . . If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from

directing the trial court to determine whether a new trial shall be granted."

By no stretch of the imagination can these words be construed as words of limitation. They do not prohibit the appellate court from doing anything. They are permissive only. They permit the appellate court to order the granting of a new trial, and they permit the appellate court to leave the granting of a new trial up to the trial court. But they do not prevent or prohibit the appellate court from doing anything it was by statute empowered to do!

As set forth in the Judicial Code (Part IV supra), the appellate courts of the United States — of which the Court of Appeals is unquestionably one — have the statutory power to reverse judgments properly brought before them, to remand such judgments and to direct the entry of other judgments. If an appellate court did not have this power, it would not be an appellate court. Petitioner's statement that all the Court of Appeals could do here was either affirm, grant a new trial itself, or order the trial court to pass on the necessity of a new trial is absolutely contrary to the statute, and has no basis whatsoever.

Petitioner's brief is devoid of any citation of authority — case or otherwise — supporting her contention here that the powers of the Court of Appeals to reverse, remand and dismiss are in any limited by Rule 50(d). We have found no such authority, and we submit that no such authority exists.

D. *Petitioner Failed to Request the Relief to Which Rule 50(d) Entitled Her.* As we have already established, Rule 50(d) extends certain rights to litigants; it does not restrict the powers of the appellate courts. As appears

from the record in this case, petitioner at no time in either court below sought any order to the effect that if judgment notwithstanding the verdict were granted by the trial court or ordered by the Court of Appeals on appeal, she be granted a new trial. This was her right under Rule 50(d), and she utterly failed to exercise — or even attempt to exercise said right. Having failed to ask either court for any such relief, she cannot seek certiorari here for said courts' failure to grant any such non-requested relief. In her brief before the Court of Appeals, petitioner sought only one thing — affirmance of the judgment of the District Court. Her very words to that effect were:

> ". . . There being no reversible error present, the appellee prays *that the judgment be affirmed* and that there be granted to the appellee such other and further relief as to the court may seem appropriate." (Page 16 of Brief of Appellee). (Emphasis added)

E. *Petitioner's Right to Jury Trial Has Not Been Denied.* Petitioner infers in her petition that in reversing the judgment entered on the jury verdict, the Court of Appeals acted contrary to the Seventh Amendment to the United States Constitution. No cases are cited in support of such assumption, and the great weight of authority clearly holds that neither directed verdicts in trial courts nor reversals and dismissals on appeal nor granting of judgments notwithstanding the verdict deprive any litigant of any rights under the said Amendment. One of the many decisions which so hold is *Galloway v. United States,* 319 U.S. 372, where this Court stated as follows: (Page 389)

> "If the intention is to claim generally that the Amendment deprives the federal courts of power to direct

a verdict for insufficiency of evidence, the short answer is the contention has been foreclosed by repeated decisions made here consistently for nearly a century. (Citing cases)."

F. *There is no Important Question of Federal Law.* Reduced to its simplest terms, petitioner asks this Court to grant certiorari for no other reason than to construe the provisions of Rule 50(d) (P. 5 of Petition). The provisions of the rule are clear and understandable, and have not been the subject of any judicial dispute since their adoption in 1963. Petitioner's inability to understand such simple provisions does not convert a correct decision into an important question of Federal law. Furthermore, Rule 50(d) was not involved in this case and has nothing to do with this case.

VIII. CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. [redacted] 12

SANDRA LEE NEELY, by her legal representative and guardian, Cecile V. Neely,

Petitioner,

vs.

MARTIN K. EBY CONSTRUCTION CO., INC.

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONER

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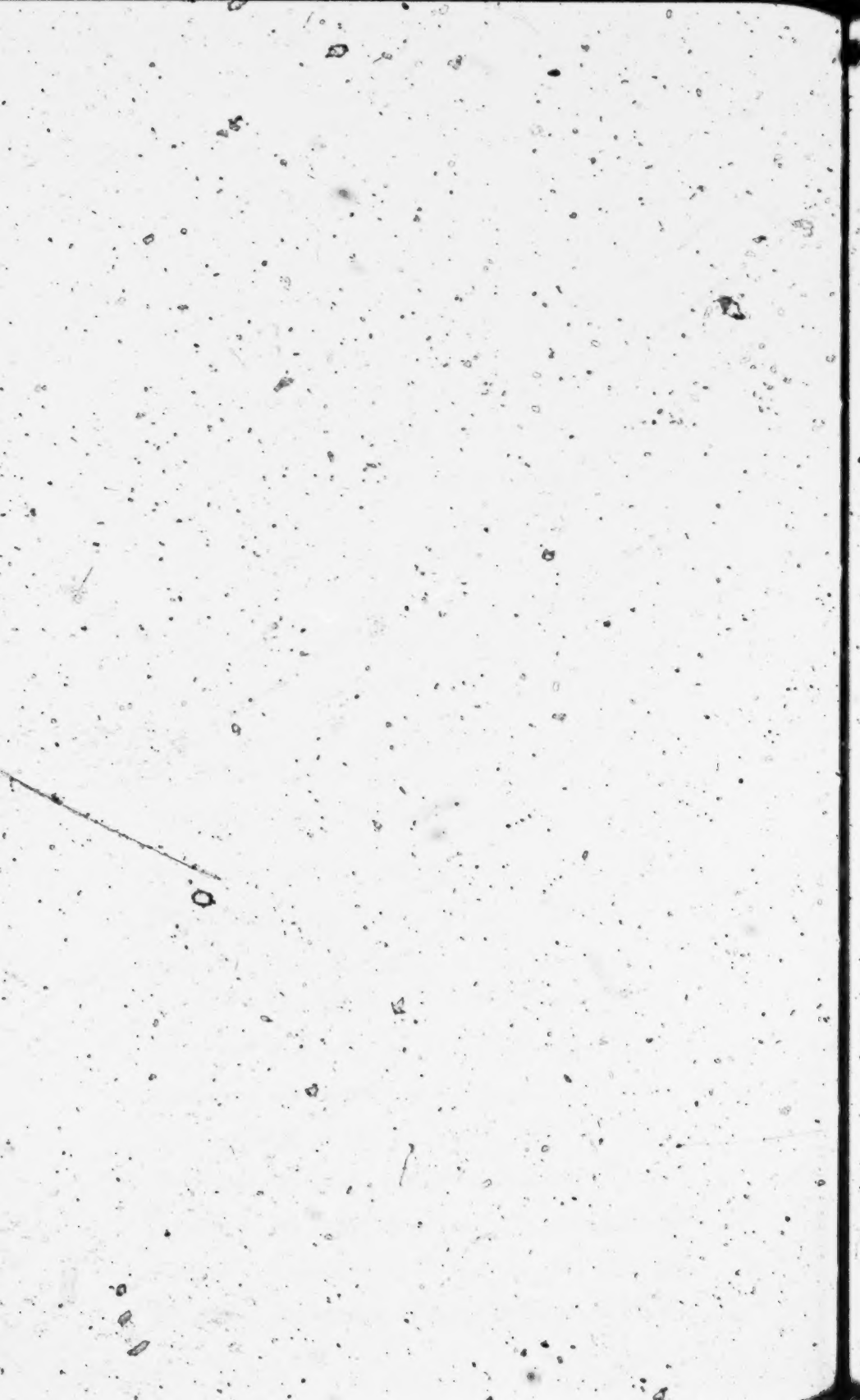

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 383

SANDRA LEE NEELY, by her legal representative and guardian, Cecile V. Neely,

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vs.

MARTIN K. EBY CONSTRUCTION CO., INC.

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

This writ of certiorari was issued to review a judgment of the Court of Appeals of the Tenth Circuit in Case No. 7796 entered on April 26, 1965 (344 F.2d 482). The decision of the Circuit Court reversed a judgment in favor of this petitioner on a jury verdict obtained in the United States District Court for the District of Colorado.

JURISDICTION

The judgment of the Court of Appeals was entered on April 26, 1965. The petition for writ of certiorari was filed on July 22, 1965 and was granted on November 15, 1965. The jurisdiction of this court rests on Title 28, United States Code, Sec. 1254 (1).

QUESTIONS PRESENTED

I. Did the Court of Appeals err in deciding that there were no jury issues of negligence and proximate cause?

II. Whether Rule 38(a) of the Federal Rules of Civil Procedure and the Seventh Amendment of the Constitution of the United States preclude the Court of Appeals from instructing the trial court to dismiss an action wherein the trial court denied the defendant's Motions for New Trial and for Judgment Notwithstanding the Verdict and entered judgment for the plaintiff?

III. Whether the Court of Appeals, after deciding that respondent should have been granted a judgment n.o.v., had power under Rule 50 of the Federal Rules of Civil Procedure and the decisions in *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212; *Globe Liquor Co. v. San Roman*, 332 U.S. 571; and *Weade v. Dichmann, Wright & Pugh*, 337 U.S. 801, to order the case dismissed and thereby deprive petitioner of any opportunity to invoke the trial court's discretion on the issue of whether petitioner should have a new trial?

IV. Whether the Court of Appeals erred in ordering the District Court not merely to enter a judgment n.o.v. for respondent but to dismiss plaintiff's case in view of Rule 50(c)(2) of the Federal Rules of Civil Procedure which gives a party whose verdict has been set aside the right to make a motion for a new trial not later than 10 days after entry of judgment notwithstanding the verdict?

CONSTITUTIONAL PROVISIONS AND FEDERAL RULES INVOLVED

Seventh Amendment of the Constitution of the United States provides as follows:

> Jury Trial in Civil Actions.—In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law.

Rule 38(a) of the Federal Rules of Civil Procedure provides as follows:

> The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

Rule 50 of the Federal Rules of Civil Procedure, as amended, effective July 1, 1963, provides as follows:

> (a) MOTION FOR DIRECTED VERDICT: WHEN MADE; EFFECT. A party who moves for a direct verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.
>
> (b) MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT. Whenever a

motion for a directed verdict made at the close of all evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

(c) SAME: CONDITIONAL RULINGS ON GRANT OF MOTION.

(1) If the motion for judgment notwithstanding the verdict, provided for in subdivision (b) of this rule, is granted, the court shall also rule on the motion for a new trial, if any, by determining, whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new

trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court. (2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 not later than 10 days after entry of the judgment notwithstanding the verdict.

(d) SAME: DENIAL OF MOTION. If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

STATEMENT

The minor plaintiff (petitioner here), acting through her legal representative, brought an action for damages for the wrongful death of her father while he was working as an engineer in the erection of a missile launching silo in Colorado. Jurisdiction of the trial court was based upon diversity of citizenship and an amount in controversy in excess of $10,000.00, exclusive of costs and interest as provided by Title 28, United States Code, Sec. 1332.

The plaintiff claimed that her father died as a direct result of a fall from a certain wooden scaffold or platform and that his fall was the proximate result of the negligence

of the defendant in the erection, maintenance and supervision of that scaffold or platform. A federal jury awarded her the sum of $25,000.00 damages, this being the maximum award permissible under Colorado's wrongful death statute. The defendant filed a motion for judgment notwithstanding the verdict in accordance with a motion for directed verdict previously made, and in the alternative, the defendant moved for a new trial. The trial court denied both motions and entered judgment on the verdict in favor of the plaintiff. The defendant (respondent here) appealed to the Court of Appeals which reversed the action with instructions to the trial court to dismiss.

Petitioner applied for writ of certiorari which was granted on November 15, 1965.

ARGUMENT

I. DID THE COURT OF APPEALS ERR IN DECIDING THAT THERE WERE NO JURY ISSUES OF NEGLIGENCE AND PROXIMATE CAUSE?

The petitioner contends that there was produced at the trial of this case sufficient evidence to be submitted to the jury on both the issue of negligence and the issue of proximate cause.

To orient the Court with the scene of the occurrence, the petitioner was inserted in the Appendix at the back of her brief, a reproduction of plaintiff's Exhibits 1, 2, 3 and 5, which are explained in the transcript of record on pages 17 through 23; and a reproduction of plaintiff's trial Exhibit 10, which is explained in the transcript of record on pages 23 and 24.

Respondent knew the purpose for which the scaffold was being built (R. 47, 48, 75) or modified (R. 16) and owed a duty to Gary Neely, deceased, to provide him with a safe scaffold from which to gain access to the counter-weights in quadrants II and III. Mr. Blanchard, the day silo captain, requested modification of the scaffold because a piece of

wood interfered with the movement of the counter-weights (R. 15, 16) and prevented the engineers from taking the critical measurements. Instead of carefully trimming the scaffold to comply with the requested change, the respondent breached its duty by narrowing the scaffold to such an extent as to make the distance from the scaffold to the counter-weight in quadrant II dangerously long. It was made perfectly clear to the defendant that the only purpose of the scaffold was to permit the deceased and his co-workers access to the counter-weights so that they might complete their mesurements (R. 16, 75). Mr. Imel, the carpenter foreman for the respondent, made it clear that he "... had built a scafford for them to work *off of* (R.75) and not to work *on*.

For some inexplicable reason, the respondent chose to build a railing along the back and one side of the scaffold, which railing acted as a barrier between the scaffold and the counter-weight in quadrant II (R. 46, 47 and plaintiff's Exhibits 1, 2, 3, 5 and 10) thus materially increasing the distance to be traveled over empty space by forcing Mr. Neely to take a diagonal route. On the side of the scaffold leading to the counter-weight in quadrant III there was no railing (R.57) to interfere with the workers' access.

The jury had before it the photographs which were admitted into evidence. On plaintiff's trial Exhibit 3, the flooring of the scaffold at the point where the workers must traverse it, does not appear to be completed and raised impediments can be seen.

Three large pieces of timber are seen protruding out from under the plyboard floor-covering for a distance which appears to be about 6 inches. These protruding beams create hazards to walking from the quadrant III side of the scaffold to the quadrant II side. In addition, the kickboard of the railing is shown to protrude beyond the upright support to provide still another hazard to safe passage.

The scaffold was built or modified solely under the direction of Mr. Imel, an employee of the respondent, (R.47).

The testimony of Mr. Keenan, a former employee of the respondent, was self-contradictory. At one point he indicated that because of the lunch hour there was not enough time to complete the scaffold (R.47), and at another point he said that the scaffold was as complete as the respondent intended (R.50, 54).

From the above evidence, the jury could well conclude that because the scaffold was narrowed creating too large a space between it and the counter-weight in quadrant II, because the respondent placed or failed to remove the railing, and because of the hazardous condition of the floor of the scaffold and the protruding kickboard of the railing, the respondent was negligent and that this negligence was a proximate cause of the fall and of Mr. Neely's death.

In reinstating a verdict previously set aside by a trial court, the Supreme Court of the State of Colorado stated:

> "The evidence and reasonable inferences to be drawn therefrom goes beyond proving a fall and injuries. It is not at all unusual that plaintiff could not testify as to whether she stepped in the hole, on the edge thereof, or on debris in or about the hole. The fact remains that the fall occurred at the place of the hazard while plaintiff was proceeding in a normal manner and at the place designated for crossing by pedestrians." *Jasper v. City and County of Denver*, 144 Colo. 43, 354 P.2d 1028 (1960).

In the *Jasper* case, the plaintiff testified that she was proceeding along a sidewalk in Denver, arrived at an intersection, looked to see if a certain bus was coming, looked to see the color of the traffic light, then stepped off the curb into the crosswalk where she fell suffering injuries. The evidence disclosed negligence on the part of the defendant City since a hole was found in the crosswalk at a point near the gutter. There were no witnesses to the fall. The plaintiff said only that she stepped off the curb, hit something and went down. After the fall, she found herself sitting in

the hole. There was no direct testimony that the hole itself caused the fall. The jury must have believed that the element of proximate cause was present, for it found in her favor. The trial judge felt that proof had failed and he set aside the verdict. But the Supreme Court of Colorado was of the opinion that the jury may use its own reason and experience in deducing the presence of proximate cause from known facts.

Mrs. Jasper lived to testify. Mr. Neely did not. However, there is a presumption that Mr. Neely exercised due care for his own safety at the time of his death. *Looney v, Metropolitan R. Co.*, 200 U.S. 480, 488; *Tennant v. Peoria & P.U. Ry Co.*, 321 U.S. 29, 34.

Another Colorado case illustrating the proof of proximate cause by circumstantial evidence is *Remley v. Newton*, 147 Colo. 401, 364 P.2d 581 (1961). A six-year-old guest at a dude ranch was seen playing with a tether ball affixed to a pole in the playground area. A few minutes later his mother and father heard cries from the playground and rushed out to find their boy lying unconscious on the ground, his head and face covered with blood, his head a few inches from a tether ball pole which had fallen over. The trial court took the case from the jury, one of the reasons being that "... there is no evidence to show that the pole was what hit the plaintiff ..." The Supreme Court reversed and remanded the lawsuit for a new trial quoting from 20 Am. Jur. p. 1043, sec. 1189 as follows:

> "The rule as to circumstantial evidence in a civil case is that a party will prevail if the preponderance of the evidence is in his favor. Where two equally plausible conclusions are deducible from the circumstances, the jury is left to decide which shall be adopted."

There may be other theories which are equally plausible, but when the jury finds for the petitioner as they did in this case, the Court of Appeals, in ordering the suit dismissed, commits "... an undue invasion of the jury's his-

toric function." *Gallick v. Baltimore & Ohio R. Co.*, 372 U.S. 108, 116; *Lavender v. Kurn*, 327 U.S. 645, 652; *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500; *Dennis v. Denver & Rio Grande Western R. Co.*, 375 U.S. 208; *Davis v. Baltimore & Ohio R. Co.*, 379 U.S. 671.

The rule of circumstantial evidence applies equally to the establishment of negligence. As was stated in *Remley v. Newton*, supra.:

> "While it is true that 'proof of the happening of an accident, or the incurrence of an injury alone raises no inference of negligence,' it is equally true that negligence may be established by the facts and circumstances surrounding an accident." 364 P.2d 583.

II. WHETHER RULE 38(a) OF THE FEDERAL RULES OF CIVIL PROCEDURE AND THE SEVENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES PRECLUDE THE COURT OF APPEALS FROM INSTRUCTING THE TRIAL COURT TO DISMISS AN ACTION WHEREIN THE TRIAL COURT DENIED THE DEFENDANT'S MOTIONS FOR NEW TRIAL AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND ENTERED JUDGMENT FOR THE PLAINTIFF?

Facts tried by a jury in this case were re-examined by the Court of Appeals otherwise than according to the common law in violation of the Seventh Amendment of the Constitution of the United States and Rule 38(a) of the Federal Rules of Civil Procedure.

The Seventh Amendment flatly declares that:

> "No fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law."

This court has had occasion to apply this mandate in *Metropolitan R. Co. v. Moore*, 121 U.S. 558, 573, and *Fairmount Glass Works v. Coal Co.*, 287 U.S. 474, 481.

According to *Crim v. Handley*, 94 U.S. 652, 657, once a common law issue was tried to a jury, the appellate court's jurisdiction was limited to the finding of errors of law in the proceedings and the award of a *venire facias de novo*, or new trial. There was no provision at common law for dismissal of such a case once a jury had returned a verdict for a plaintiff.

This Court repeatedly has expressed its abhorrence of invasion of the jury function by the court. A particularly apt expression of the jury's role and importance is found in *Tennant v. Peoria & P.U. Ry. Co.*, 321 U.S. 29, 35:

> "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.
>
> "Upon an examination of the record we cannot say that the inference drawn by this jury that respondent's negligence caused the fatal accident is without support in the evidence. Thus to enter a judgment for respondent notwithstanding the verdict is to deprive petitioner of the right to a jury trial."

III. WHETHER THE COURT OF APPEALS, AFTER DECIDING THAT RESPONDENT SHOULD HAVE BEEN GRANTED A JUDGMENT N.O.V., HAD POWER UNDER RULE 50 OF THE FEDERAL RULES OF CIVIL PROCEDURE AND THE SUPREME COURT OF THE UNITED STATES DECISIONS IN CONE V. WEST VIRGINIA PULP & PAPER CO., 330 U.S. 212; GLOBE LIQUOR CO. V. SAN ROMAN, 332 U.S. 571; and WEADE V. DICHMANN, WRIGHT & PUGH, 337 U.S. 801, TO ORDER THE CASE DISMISSED AND THEREBY DEPRIVE PETITIONER OF ANY OPPORTUNITY TO INVOKE THE TRIAL COURT'S DISCRETION ON THE ISSUE OF WHETHER PETITIONER SHOULD HAVE A NEW TRIAL?

The Court of Appeals was without authority to order the case dismissed. Assuming that Rule 50(d) of the Federal Rules of Civil Procedure permits the Court of Appeals to reverse a trial court and order the entry of a judgment notwithstanding the verdict, there is certainly no provision for the Court of Appeals to order the dismissal of an action under the circumstances of this case.

In this case, the Court of Appeals had four (or perhaps five) alternatives available to it. It could have: (1) affirmed the judgment; (2) reversed and remanded with instructions to the trial court to determine whether or not a new trial should be granted; (3) reversed and remanded with instructions to the trial court to determine whether or not a judgment notwithstanding the verdict should be entered; (4) reversed and remanded with instructions to grant a new trial; or (5) *perhaps* it could have reversed and remanded with instructions to grant a judgment notwithstanding the verdict.

As we have previously argued from the case of *Crim v. Handley*, 94 U.S. 652, 657, the appellate court's powers did not extend to the fifth alternative. However, assuming for the moment that this most drastic remedy would not violate the United States Constitution, nevertheless, the party who

revailed in the trial court should certainly have been given n opportunity to move for a new trial under Rule 59 or to ove for a dismissal without prejudice under Rule 41. This, e believe, is the import of the decision in *Cone v. West irginia Pulp & Paper Co.*, 330 U.S. 212, 216, 217. This posi-on is certainly bolstered by the 1963 amendments to Rule 0 which are apparently intended in part to clarify this very roblem.

To summarily dismiss Sandra Lee Neely out of court, us leaving her no remedy and no opportunity to direct the ttention of either the trial or the appellate court to errors gainst her, is to defeat the ends of justice and to deprive er of the fruits of a jury verdict.

> "Determination of whether or not a new trial should be granted or a judgment entered under Rule 50(b) calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no printed transcript can impart." *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 216; *Globe Liquor Co. v. San Roman*, 332 U.S. 571, 574.

The action of the appellate court in dismissing this se has deprived the petitioner of her opportunity to in-oke the trial court's discretion on the issue of whether the etitioner should have a new trial because of errors com-itted by the trial court and heretofore not enumerated. or does it give her an opportunity to move for a nonsuit o that she might file a new action after further prepara-on as is suggested in *Cone v. West Virginia Pulp & Paper o., supra.*

IV. WHETHER THE COURT OF APPEALS RRED IN ORDERING THE DISTRICT COURT NOT IERELY TO ENTER A JUDGMENT N.O.V. FOR RE-PONDENT BUT TO DISMISS PLAINTIFF'S CASE N VIEW OF RULE 50(c)(2) OF THE FEDERAL ULES OF CIVIL PROCEDURE WHICH GIVES A ARTY WHOSE VERDICT HAS BEEN SET ASIDE

THE RIGHT TO MAKE A MOTION FOR A NEW TRIAL NOT LATER THAN 10 DAYS AFTER ENTRY OF THE JUDGMENT NOTWITHSTANDING THE VERDICT?

Rule 50(c)(2) provides:

"The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 not later than 10 days after entry of the judgment notwithstanding the verdict."

Had the trial judge set aside Sandra Lee Neely's verdict after hearing on the motion for judgment notwithstanding the verdict, then the plaintiff could have filed a motion for new trial under Rule 59, Federal Rules of Civil Procedure, setting out those erroneous rulings of the trial court which may have interfered with the plaintiff's attempts to prove negligence and proximate cause. For example, the plaintiff has never had an opportunity to complain that the trial court refused to allow plaintiff's witnesses to testify as experts as to whether or not the scaffold was adequate and proper to do the job that it was intended to do. (R. 27, 28, 29, 43, 59, 77 and 79)

Dismissal of this case by the Court of Appeals suddenly left the plaintiff, your petitioner, without a remedy. This amounts to a deprivation of the fruits of a $25,000.00 verdict and judgment without due process of law in violation of the mandate of Rule 50(c)(2).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be reversed and that the verdict of the jury and the judgment of the trial court be reinstated and for such other and further relief as to this Honorable Court may seem appropriate.

Respectfully submitted,

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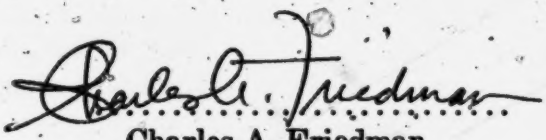
Attorneys for Petitioner

PROOF OF SERVICE

I, Charles A. Friedman, one of the attorneys for petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 5th day of January, 1966, I served a copy of the foregoing Brief of the Petitioner on John C. Mott, Anthony F. Zarlengo, and Joseph S. McCarthy, attorneys for respondent, by mailing copies in duly addressed envelopes with proper postage prepaid, to John C. Mott, Esq., 1020 American National Bank Building, Denver, Colorado, 80202; Anthony F. Zarlengo, Esq., 595 Capitol Life Center, Denver, Colorado, 80203; and Joseph S. McCarthy, Esq., 745 Washington Building, Washington 5, D. C.



Charles A. Friedman

APPENDIX

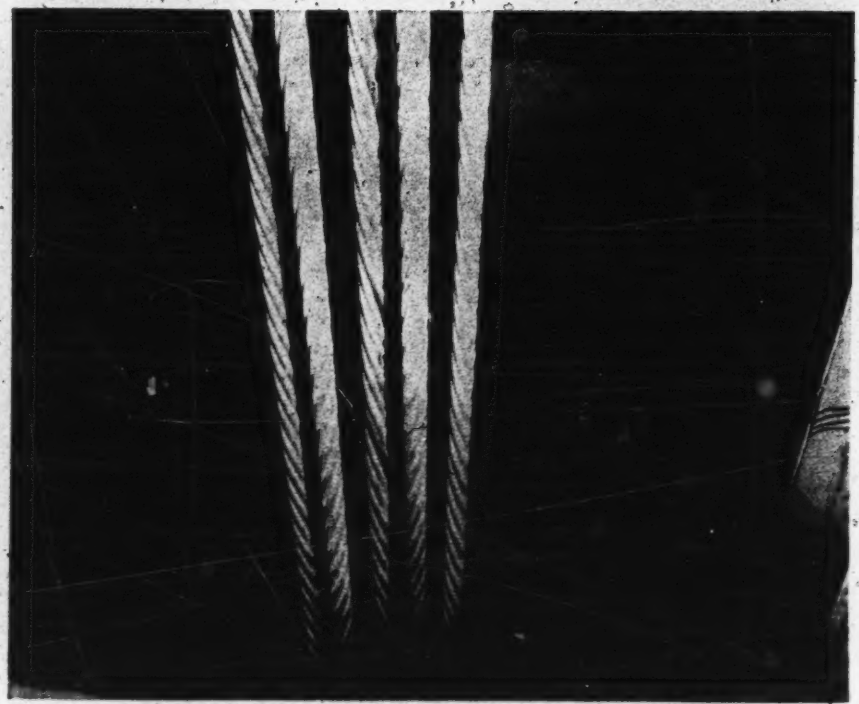


EXHIBIT ONE

EXHIBIT TWO

EXHIBIT THREE

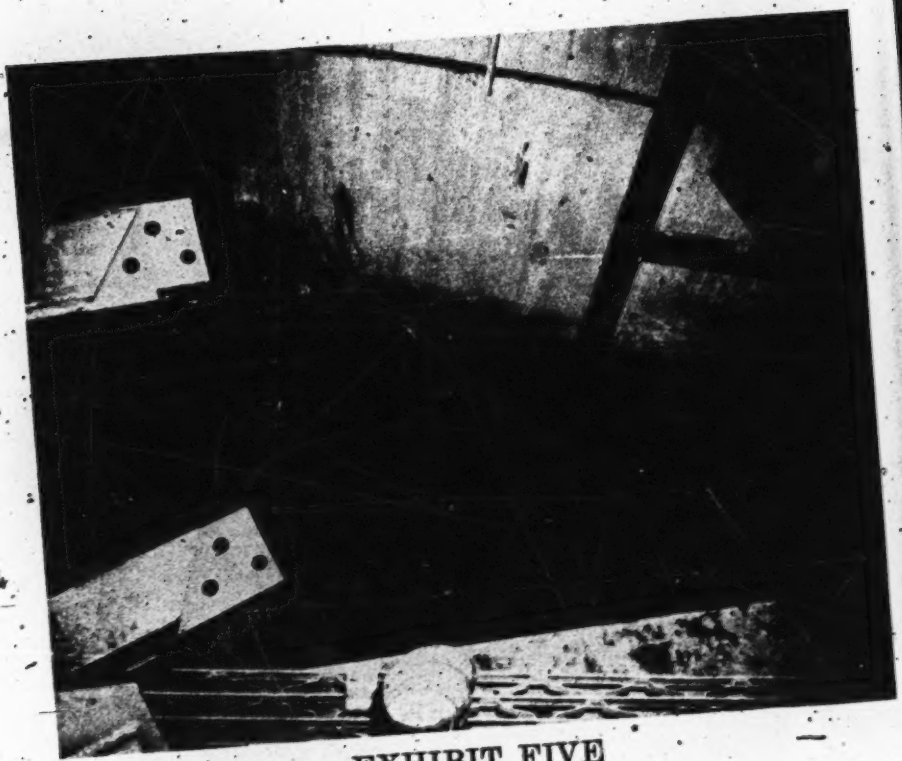


EXHIBIT FIVE

EXHIBIT TEN

[redacted]

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1963

No. [redacted] 12

Sarpas Lee Neely, by her legal representative and guardian, Cecile V. Neely,
Petitioner,
vs.
Martin K. Eby Construction Co., Inc.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[redacted]

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 383

SANDRA LEE NEELY, by her legal representative and guardian, Cecile V. Neely,
Petitioner,

vs.

MARTIN K. EBY CONSTRUCTION CO., INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

ANSWER BRIEF FOR THE RESPONDENT

I. OPINIONS BELOW

These are adequately covered in the Brief of Petitioner.

II. JURISDICTION

The jurisdictional requisites are adequately set forth in the Brief of Petitioner.

III. QUESTIONS PRESENTED

A. Whether the Court of Appeals has the power to reverse for insufficiency of evidence and remand to the District Court for dismissal a tort action in which the plaintiff obtained a judgment based upon a jury verdict, the provisions of Rule 50, Federal Rules of Civil Procedure to the contrary notwithstanding.

B. Whether the Court of Appeals, after deciding that respondent should have been granted a judgment n.o.v., had power under Rule 50 of the Federal Rules of Civil Procedure and this Court's decisions in *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212; *Globe Liquor Co. v. San Roman*, 332 U.S. 571; and *Weade v. Dichmann, Wright & Pugh*, 337 U.S. 801, to order the case dismissed and thereby deprive petitioner of any opportunity to invoke the trial court's discretion on the issue of whether petitioner should have a new trial?

C. Whether the Court of Appeals erred in ordering the District Court not merely to enter a judgment n.o.v. for respondent but to dismiss plaintiff's case in view of Rule 50 (c) (2) of the Federal Rules of Civil Procedure which gives a party whose verdict has been set aside the right to make a motion for new trial not later than 10 days after entry of the judgment notwithstanding the verdict?

D. Whether Rule 38 (a) of the Federal Rules of Civil Procedure and the Seventh Amendment of the Constitution of the United States preclude the Court of Appeals from instructing the trial court to dismiss an action wherein the plaintiff obtained a jury verdict in the Dis-

trict Court and the District Court thereafter denied defendant's Motion for New Trial and Motion for Judgment Notwithstanding the Verdict and entered judgment for plaintiff?

E. Whether the Court of Appeals correctly held that plaintiff failed to establish either the negligence of the defendant or the proximate cause of the accident which resulted in the death of plaintiff's decedent?

IV. CONSTITUTIONAL PROVISIONS, FEDERAL STATUTES AND FEDERAL RULES INVOLVED

The pertinent provisions of Rule 38 and Rule 50 of the Federal Rules of Civil Procedure, as well as the pertinent provisions of the Seventh Amendment to the Constitution of the United States are adequately set forth in the Brief of Petitioner at pp. 3, 4 and 5.

The pertinent provisions of the Judicial Code of 1948 (62 Stat. 963, 28 U.S.C. 2106) provide as follows:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances. June 25, 1948, c. 646. 62 Stat. 963.

V. STATEMENT

So as to clarify certain portions of petitioner's brief —especially the many omissions which appear in her Statement—we submit the following statement as to the facts material to the consideration of the questions presented in Petitioner's brief.

A. THE PLEADINGS

This is an action in tort for the alleged wrongful death of Gary Lee Neely, deceased. In her amended complaint, petitioner (minor daughter of decedent) alleged that her father was killed in an accident which occurred in a missile silo under construction southeast of Denver, Colorado; and further that her father's death was proximately caused by the negligence of respondent in the erection, maintenance and supervision of a certain scaffold located in the silo. (R. 2-3). In its answer respondent admitted the time and place of the accident and death, but denied the remaining material allegations of the amended complaint (R. 4-5). Jurisdiction of the trial court was based upon diversity of citizenship and an amount in controversy in excess of $10,000.00. The case was tried to a jury in United States District Court for the District of Colorado. At the close of petitioner's case, respondent moved for a directed verdict, the principal ground being that of legal insufficiency of the evidence to prove a case. (R. 71). This motion was denied (R. 73). At the close of all the evidence, respondent again moved for a directed verdict and the same was denied (R. 80). The jury then returned a verdict in favor of petitioner for $25,000.00 (R. 87) upon which judgment was forthwith entered (R. 6). The next day, respondent filed its motion for judgment notwithstanding the verdict

or for new trial, asking among other things that the verdict of the jury be set aside and that judgment be entered in favor of respondent in accordance with its previous motions for directed verdict (R. 6-8). No motions attacking the judgment or for any other relief were filed by petitioner. Respondent's motion just mentioned was denied by the District Court (R. 8). Respondent thereafter appealed to the Court of Appeals for the Tenth Circuit which court by writtten opinion reversed the judgment of the trial court and remanded the cause to the trial court with instructions to dismiss (R. 88-95). The mandate of the Court of Appeals was thereafter carried out. Petitioner then applied for writ of certiorari, which was granted by this Court.

At no time during the pendency of the action in the Court of Appeals—or at any time thereafter—did petitioner by brief, motion or otherwise assert any grounds which would entitle her to a new trial should the Court of Appeals reverse. The only request made of the Court of Appeals by petitioner in her brief there was that the judgment of the trial court be affirmed (Page 16 of Petioner's brief in Court of Appeals).

B. THE EVIDENCE

In her statement filed with this Court, petitioner makes no reference to the evidence adduced in the trial court; however, since she thereafter refers to said evidence in her Argument, we feel that a brief summary of the evidence is necessary here.

The silo where the accident occurred was being constructed and equipped by several different contractors,

and when completed was designed to house underground a Titan missile together with an elevator or launcher by means of which the missile could be raised from its underground position for firing. The movements of the launcher were controlled and stabilized by counterweights which went down as the launcher rose and vice versa. The silo was a cylindrical concrete structure 50 feet in diameter and 130-140 feet deep (R. 30). For construction purposes, the silo was divided into four quadrants, to-wit: Quadrant I the southeast quarter; Quadrant II the northeast quarter; Quadrant III the northwest quarter and Quadrant IV the southwest quarter (R. 24). Located within the silo was a steel framework, called a crib, in which the launcher was able to ride up and down (R. 24). Outside the crib were the two counterweights, which rode on a system of rigid rails (R. 24). The counterweights were of a rather odd shape, so as to fit between the square framework of the crib and the round outside wall of the silo (Exhibit 10). One counterweight was located in Quadrant II and another in Quadrant III.

Scaffolding and platforms required during the course of construction were furnished and built by respondent as subcontractor on the project. Neely's employer was also a subcontractor on the project, its contract providing that it would furnish engineering services. Still another subcontractor provided the millwrights and other crafts working in the area. As of the day of the accident, the silo itself was practically complete, but the missile was yet to be installed. Both the launcher and the counterweights had been installed, but had yet to be tested operationally.

On the morning of the day of the accident, the

launcher was run for the first time on its own power, and at about noon on said date the engineering services company by whom Neely was employed as night silo captain was given exclusive occupancy of the silo for the purpose of performing certain tests (R. 13). One of the tests required certain measurements to be taken from a drive locking mechanism at the bottom of the silo and the counterweight locking mechanism located about 6 feet below the top of the silo (R. 15). Because certain scaffolding previously erected for other purposes in the silo by respondent interfered with the test measurements, the day silo captain Fred P. Blanchard decided that the platform would have to be modified (R. 15) and directed respondent's carpenter foreman to make the necessary changes (R. 16; 33-34). The platform to be modified was about 2 feet above the counterweights, and after the changes had been made did not cover the entire space between the counterweights.

Blanchard denied being present while the modifications were being made (R. 36) but in this he was contradicted by respondent's foreman Imel (R. 75). When the modifications were complete Blanchard told the millwrights they could begin making the critical measurements (R. 16) at which time respondent's carpenters were either gone or getting ready to leave (R. 37). Before leaving the area, Blanchard observed Neely standing on the platform with a notebook on the rail, talking to the millwrights. He asked Neely how things were going, to which Neely replied that "everything is under control" (R. 16) whereupon Blanchard left the area, not to return until after the accident. Before leaving, Blanchard observed that the platform was on the level requested, (R. 36), that the area was well lighted and that he could

see the counterweights and the platform as well as the gaps between them (R. 40).

The platform in question—a temporary structure—was located both before and after the accident in the same place (R. 34). It extended in a north-south direction from the crib to the outside edge of the silo and was supported at the inside end by I-beams and on the outside end by pipes, both of which formed permanent parts of the installation (R. 45-46). On traversing this distance, the platform went between the two counterweights in such a manner that the Quadrant III counterweight was west of the platform and the Quadrant II counterweight was east of the platform. The platform was not more than two feet above the counterweights on a vertical plane, and it was one or two feet away from each counterweight on a horizontal plane (R. 37). These distances were further illustrated by Exhibits 1, 2 and 3 attached to petitioner's brief and which were admitted into evidence as being accurate representations of the scene at the time the accident occurred (R. 18). There was a railing on the plaform that commenced about 3 feet from the crib and ran along the Quadrant II or east side of the platform, and continued along the end next to the outer wall. There was no railing along the Quadrant III or west side of the platform (R. 46-47).

In addition to Neely, there were three other men engaged in making the measurements—McCoun, Bowen and Wilhoit (R. 60). It was Neely's duty to record the measurements when made by the others (R. 57). To make the measurements, it was necessary that the four men be on top of the counterweights (R. 33). Each of them stepped, or jumped, from the platform to the counter-

weight in Quadrant III and completed the measurements there (R. 57). Wilhoit testified that he then proceeded from that counterweight to the platform, walked across the platform, stepped on the steel crib through the opening left in the railing there, walked along the steel crib, and then jumped over onto the top of the Quadrant II counterweight (R. 58). Upon arriving at the Quadrant II counterweight, he turned for a moment to see if Neely and the others were coming over, at which time he observed Neely coming across the platform. He then turned his attention to his own work, and upon glancing up a second time saw Neely falling head first by the counterweight (R. 58). He was unable to catch Neely and thus halt him from falling to his death (R. 58). Wilhoit admitted that the railing did not break (R. 68), that the platform did not break (R. 68) and that there was no grease in the area (R. 69). Neither of the other two men who were present were called to testify. There was no other veidence as to the cause of the accident.

VI. SUMMARY OF ARGUMENT

A. By virtue of the Judicial Code of 1948, the Court of Appeals has clear and unquestioned power to reverse a case lawfully brought before it for review, and to remand said case to the court from whence it came with instructions to dismiss the same. This statutory power of the Court of Appeals is clearly recognized in the Federal Rules of Civil Procedure and by the decisions of this Court. 62 Stat. 963, 28 U.S.C. 2106; Rule 50, Federal Rules of Civil Procedure; *Cone v. West Virginia Pulp & Paper* Co., 330 US 212; *Globe Liquor Co. v. San Roman*, 332 US 571; *Montgomery Ward & Co. v. Duncan*, 311 US 243;

Johnson v. New York, New Haven & Hartford Railroad Company, 344 US 48.

B. After respondent's motion for judgment n.o.v. was denied by the trial court, and after respondent filed its appeal in the Court of Appeals, petitioner as appellee in the Court of Appeals had ample opportunity under Rule 50(d) Federal Rules of Civil Procedure to assert in that court any grounds she may have had for a new trial should that court reverse the case. Failing to assert such rights in the Court of Appeals, petitioner cannot now claim that the judgment of the Court of Appeals deprived her of the right to request a new trial. Neither *Cone v. West Virgina Pulp & Paper Co.*, 330 US 212, nor *Globe Liquor Co. v. San Roman*, 332 US 571, nor *Weade v. Dichman, Wright & Pugh*, 337 US 801, so hold. Rule 50, Federal Rules of Civil Procedure.

C. Since the trial court denied rather than granted respondent's motion for judgment n.o.v., the provisions of Rule 50 (c) (2) have no application here. Instead, if petitioner desired to assert grounds for new trial, it was encumbent on her to do so as appellee in the Court of Appeals. Failing to do so, she has no further right to request a new trial. Rule 50, Federal Rules of Civil Procedure; *Notes of Advisory Committee on Rules*, 28 U.S.C.A. Rules 34 to 51 (1965 Pocket Part) Page 184-185.

D. Neither the Seventh Amendment to the Constitution of the United States, nor Rule 38(a) Federal Rules of Civil Procedure prevent the Court of Appeals from reversing (for legal insufficiency of the evidence) a judgment based upon a jury verdict in the trial court and remanding the same to the trial court with instructions to dismiss the action. This Court has so held both before

and after the adoption of Rule 50 of the Federal Rules of Civil Procedure, and the rule itself clearly recognizes this power. Rule 50(b) Federal Rules of Civil Procedure; *Baltimore & C. Line v. Redman*, 295 US 654; *Montgomery Ward & Company v. Duncan*, 311 US 243.

E. The Petition for Writ of Certiorari did not challenge the rulings of the Court of Appeals on the merits of the case, and we submit those matters are not properly before the Court at this time; however, petitioner devotes much argument to those matters in her brief, and we reply. Since petitioner failed to establish what caused Neely to fall or that respondent was negligent with respect to the fall, there was nothing, under Colorado law, for the jury to determine, from the undisputed evidence, save by speculation. The proximate cause of the accident was not established. The Court of Appeals viewed the evidence in the light most favorable to petitioner, correctly held under Colorado law that the motion for directed verdict should have been granted for insufficiency of evidence and properly reversed the case. *Gordon v. Clotsworthy*, 127 Colo. 377, 257 P.(2d) 410; *Mosko v. Walton*, 144 Colo. 602, 358 P.(2d) 49.

VII. ARGUMENT

A. WHETHER THE COURT OF APPEALS HAS THE POWER TO REVERSE FOR INSUFFICIENCY OF EVIDENCE AND REMAND TO THE DISTRICT COURT FOR DISMISSAL A TORT ACTION IN WHICH THE PLAINTIFF OBTAINED A JUDGMENT BASED UPON A JURY VERDICT, THE PROVISIONS OF RULE 50 FEDERAL RULES OF CIVIL PROCEDURE TO THE CONTRARY NOTWITHSTANDING?

Pertinent portions of the Judicial Code of 1948 (62 Stat. 963, 28 U.S.C. 2106) provide as follows:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances. June 25, 1948, c. 646, 62 Stat. 963."

The Court of Appeals is unquestionably a court of appellate jurisdiction and by virtue of the Statute just set out clearly has the power to reverse judgments properly brought before it, to remand such judgments to the trial court, and to direct the trial court to enter other judgments. If an appellate court did not have this power, it would not be an appellate court. The Statutory power of the Court of Appeals just set out is not limited to cases tried to the Court sitting without a jury, but clearly applies to all judgments entered by lower courts, whether based upon jury verdicts or not. Nothing in the above-mentioned statute in any way limits the appellate powers of the Court of Appeals to any particular type of case, and the statute specifically refers not only to reversal but also to the direction for entry of such appropriate judgment, decree or order as may be just under the circumstances. This power is also re-affirmed in Rule 50(c) and Rule 50(d) Federal Rules of Civil Procedure.

It is significant to note that the statute just mentioned was passed after this Court's decisions in *Cone v. West Virginia Pulp & Paper Co.*, 330 US 212; and *Globe Liquor v. San Roman*, 332 US 571, to which cases extended

reference will be made in Part II of this brief. This fact strengthens those decisions if they left any doubt as to the power of the Court of Appeals to remand for dismissal in a proper case.

Finally, in *Montgomery Ward & Co. v. Duncan*, 311 US 243, decided in 1940, this Court clearly held that the Court of Appeals had the power under Rule 50(b) to reverse a trial court judgment and order that court to enter a judgment n.o.v. Concerning the proper and justified procedure under Rule 50(b), this Court stated as follows:

> "If alternative prayers or motions are presented, as here, we hold that the trial judge should rule on the motion for judgment. Whatever his ruling thereon he should also rule on the motion for a new trial, indicating the grounds of his decision. If he denies a judgment n.o.v. and also denies a new trial the judgment on the verdict stands, and the losing party may appeal from the judgment entered upon it, assigning as error both the refusal of judgment n.o.v. and errors of law in the trial as heretofore. *The appellate court may reverse the former action and itself enter judgment n.o.v. or it may reverse and remand for a new trial for errors of law . . . .*" *Montgomery Ward & Co. v. Duncan*, 311 US 243, 253-254. (Emphasis added)

This language was recently cited with approval by this Court in *Johnson v. New York, New Haven & Hartford Railroad Company*, 344 US 48, 56-57, where as in *Cone* and *Globe*, defendant's failure in the trial court to specifically move for judgment n.o.v. deprived the Court of Appeals to direct the entry of such judgment on appeal.

There appears no question but that if the provisions of Rule 50 are followed—which they most certainly were here—the Court of Appeals has the power, both under said Rule 50 and under the aforementioned statute, to direct the entry of a judgment of dismissal in the trial court.

B. WHETHER THE COURT OF APPEALS, AFTER DECIDING THAT RESPONDENT SHOULD HAVE BEEN GRANTED A JUDGMENT N.O.V., HAD POWER UNDER RULE 50 OF THE FEDERAL RULES OF CIVIL PROCEDURE AND THIS COURT'S DECISIONS IN CONE V. WEST VIRGINIA PULP & PAPER CO., 330 U.S. 212; GLOBE LIQUOR CO. V. SAN ROMAN, 332 U.S. 571; AND WEADE V. DICHMANN, WRIGHT & PUGH, 337 U.S. 801, TO ORDER THE CASE DISMISSED AND THEREBY DEPRIVE PETITIONER OF ANY OPPORTUNITY TO INVOKE THE TRIAL COURT'S DISCRETION ON THE ISSUE OF WHETHER PETITIONER SHOULD HAVE A NEW TRIAL?

We respectfully submit that the Court of Appeals had such power, and further that the manner in which the power was exercised in no way deprived petitioner of any opportunity to request a new trial.

Determination of this question requires a careful study of Rule 50, Federal Rules of Civil Procedure, in particular Paragraphs (c) and (d) thereof.

Paragraph (a) of Rule 50 entitles a party to move in the trial court for a directed verdict at the close of the evidence offered by an opponent without waiving his right to trial by jury and without waiving his right to put on evidence should the motion be denied. Respondent

here invoked the provisions of this paragraph in the trial court, and after its motion for directed verdict was denied (R. 73) put on evidence, following which the matter was submitted to the jury which then returned a verdict in favor of petitioner and against respondent (R. 87). We respectfully submit that Paragraph (a) of Rule 50 is not involved in this proceeding.

Paragraph (b) of Rule 50 provides that when a motion for directed verdict is not granted, the case is deemed submitted to the jury subject to a later determination of the legal sufficiency of the motion, provided that the losing party file his motion for judgment n.o.v. within ten days after judgment. Such a motion can, the Rule provides, be joined with a motion for new trial. The trial court can then (1) allow the judgment to stand (2) reopen the judgment and order a new trial or (3) reopen the judgment and direct the entry of judgment as if the requested directed verdict had been granted. Respondent here invoked the provisions of this paragraph, and within ten days after entry of judgment filed its combined Motion for Judgment Notwithstanding the Verdict or for New Trial (R. 6-8). Petitioner filed no motions attacking the judgment. The motion just mentioned was denied by the trial court (R. 8). As was the case with Paragraph (a), we respectfully submit, Paragraph (b) of Rule 50 is not involved in this proceeding.

Paragraph (c) of Rule 50 sets forth the procedures to be followed by court and counsel should the motion for judgment n.o.v. be *granted* by the trial court. We have emphasized the word *granted*, since the following Paragraph (d) refers to procedures to be followed by court and counsel should the motion for judgment n.o.v. be

denied. If the motion is *granted*, the trial court must also rule on the motion for new trial, if any, and make specific orders as to whether the same should be granted should the granting of the motion for judgment n.o.v. be vacated or reversed by a higher court. If the motion is *granted*, then the party whose verdict has been thus set aside may himself file a motion for new trial within 10 days after entry of the judgment n.o.v. We respectfully submit that Paragraph (c) of Rule 50 is not involved in this proceeding since respondent's motion for judgment n.o.v. was not granted, but rather denied. Thus it was not encumbent upon petitioner to make any motion for new trial herself in the trial court; nor is any provision contained in Paragraph (c) for the filing of such a motion. By the same token, it cannot be said that petitioner has been denied a right to seek a new trial under Rule 50 (c) (2) since petitioner clearly had no such right under said rule in the first place. We shall return to this particular phase of the matter in a subsequent paragraph.

Paragraph (d) of Rule 50 sets forth the procedures to be followed by court and counsel when the motion for judgment n.o.v. is *denied*. That, of course, is the situation here. When the motion is *denied* by the trial court, then the party who prevailed on the motion (in this case the petitioner) can—as appellee in the Court of Appeals—asert grounds *in that court* entitling him to a new trial in the trial court should the Court of Appeals reverse the ruling on the judgment n.o.v. Paragraph (d) further provides that nothing in the rule shall preclude the Court of Appeals from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

Of considerable significance, we submit, is the fact

that Rule 50(d) is only permissive insofar as the powers of the Court of Appeals are concerned. The rule does not limit the powers of that Court in any respect; rather the rule merely provides that in case the Court of Appeals reverses the judgment below, it may if it so desires rule on whether the appellee is entitled to a new trial, and if so on what terms. The rule does not require that the Court of Appeals grant a new trial; nor does it require that the granting of a new trial be left up to the trial court. Petitioner's argument that Rule 50(d) prescribes what the Court of Appeals must do is refuted by the very words of the Rule itself. The powers of the Court of Appeals are set forth in the *Judicial Code of* 1948—62 Stat. 963, 28 U.S.C. 2106—any they are in no way limited or restricted by Rule 50(d).

As appears from the record in this case, respondent filed its motion for judgment n.o.v. (R. 6-8), the motion was denied by the trial court (R. 8), the denial asserted as error in the Court of Appeals (R. 1-2), and the Court of Appeals reversed the case and remanded the same to the trial court for dismissal (R. 95). It is, therefore, Paragraph (d) of Rule 50 which controls the outcome of the case here.

Of extreme significance is the fact that at no time in the Court of Appeals did petitioner avail herself of the provisions of Rule 50(d) and assert grounds entitling her to a new trial in the event that the Court of Appeals concluded that the trial court erred in denying the motion for judgment n.o.v. In fact, the only relief requested by petitioner in the Court of Appeals was that set forth in the last sentence of the Conclusion of her brief in the Court of Appeals, which is as follows:

> "... There being no reversible error present, the appellee prays that the judgment be affirmed and that there be granted to the appellee such other and further relief as to the court may seem appropriate." (Page 16 of Brief of Appellee)

Unquestionably, petitioner asked but for one thing in the Court of Appeals—affirmance of the trial court judgment. She makes the same request here. She neither requested a new trial should the Court of Appeals reverse, nor did she assert any grounds as to why she should be entitled to a new trial should the Court of Appeals reverse. Now for the first time petitioner asserts that she has been deprived of her right under Rule 50 to seek a new trial—a right which did not exist under Rule 50(c) because the motion for judgment n.o.v. was denied by the trial court, and a right which she failed to exercise under Rule 50(d) by making no request for a possible new trial in the Court of Appeals should the case be reversed. The fact of the matter is that petitioner was not *deprived* of her rights under Rule 50—*she simply failed to exercise those rights!*

Neither *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212; nor *Globe Liquor Co. v. San Roman*, 332 U.S. 571; nor *Weade v. Dichmann, Wright & Pugh*, 337 U.S. 801 hold that petitioner has been deprived of any rights under Rule 50.

In *Cone*, the petitioner here was plaintiff in the trial court and the respondent was defendant. At the close of all the evidence, respondent moved for directed verdict on the ground that petitioner had failed to prove his case. The motion was denied. The jury returned a $15,000.00 verdict, upon which the trial court entered judgment.

Respondent moved for a new trial on the ground of newly discovered evidence, *but did not move for judgment n.o.v.* On appeal the Court of Appeals ruled that admission of certain evidence by the trial court was error, and that without said evidence there was an insufficiency of proof. The Court of Appeals then reversed the case and directed the trial court to enter judgment for respondent. The holding in *Cone* was that in the absence of a motion for judgment n.o.v. in the trial court, the Court of Appeals was without power to order the trial court to dismiss. This Court's specific language in that connection was:

> "In this case had respondents made a timely motion for judgment notwithstanding the verdict, the petitioner could have either presented reasons to show why he should have a new trial, or at least asked the court for permission to dismiss. If satisfied from the knowledge acquired from the trial and because of the reasons urged that the ends of justice would best be served by allowing petitioner another chance, the judge could have so provided in his discretion. The respondent failed to submit a motion for judgment notwithstanding the verdict to the trial judge in order that he might exercise his discretionary power to determine whether there should be such a judgment, a dismissal or a new trial. *In the absence of such a motion,* we think the appellate court was without power to direct the District Court to enter judgment contrary to the one it had permitted to stand." *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 217-218. (Emphasis added).

It should be noted that *Cone* was decided in 1946, long prior to the 1963 amendments to Rule 50 which among other things added Paragraphs (c) and (d).

Applying the language of *Cone* to the instant situation (and keeping in mind that Rule 50 is different now than it was then) it seems logical to assume that if a motion for judgment n.o.v. had been filed in that case, the Court of Appeals would have had the power to reverse and dismiss. If anything, therefore, *Cone* supports respondents here and does not require the result sought by petitioner. *Cone* also suggests that if a motion for judgment n.o.v. had been filed in that case, the petitioner (plaintiff below) might have considered dismissal under Rule 41 in order to re-try the case and to supply the crucial gap in his evidence. Petitioner here made no attempt to invoke Rule 41, even in the presence of respondent's motion for judgment n.o.v., so *Cone* is of no help to her in that respect here.

In *Globe Liquor Co. v. San Roman*, 332 U.S. 571, the petitioner here was plaintiff in the trial court and respondent was defendant. The action was for breach of warranty. At the close of all the evidence both parties in the trial court moved for directed verdict. Petitioner's motion was granted and the jury instructed to return a verdict for petitioner. Respondent moved for new trial, but not for judgment n.o.v. This motion was denied. On appeal, the Court of Appeals set aside the judgment and ordered the trial court to enter judgment for respondent. This Court granted certiorari to determine whether the action of the Court of Appeals was inconsistent with *Cone*. This Court held that since respondent made no motion for judgment n.o.v. in the trial court, the Court of Appeals erred directing the trial court to enter the judgment for respondent. It was argued there that *Cone* did not apply since in that case the trial court jury returned its own verdict, where as in *Globe* the trial court jury was directed

to return a verdict. This Court held that this distinction did not require a different result.

Again, as in *Cone,* this Court did not say the Court of Appeals had no power generally to direct the entry of judgment below; merely, that since respondent made no motion for judgment n.o.v. in the trial court, the Court of Appeals was powerless to itself direct the entry of such a judgment. The clear inference is, we respectfully submit, that if respondent in *Globe* had filed a motion for judgment n.o.v. in the trial court, the Court of Appeals would then have the power to direct the entry of judgment. Also, it should be noted that *Globe* was decided before the 1963 amendments to Rule 50 FRCP.

It is significant to point out that in *Globe* (as in the instant case) the petitioner asked this Court to reinstate the original judgment in the trial court. This Court refused, stating:

> "Whether a verdict should have been directed, however, depends upon a number of factors, including an interpretation of the law of Illinois where the contract was made, a proper interpretation of the pleadings, a determination whether the disputed deposition was admitted in evidence in whole or in part and the effect of that evidence if admitted. Under these circumstances, the judgment of the Circuit Court of Appeals in reversing and remanding the cause to the District Court is affirmed." *Globe Liquor v. San Roman,* 332 U.S. 571, 574.

For the same reasons the rulings of the Court of Appeals here with regard to the legal sufficiency or insufficiency of the evidence should stand.

In *Weade v. Dichmann, Wright & Pugh*, 337 U.S. 801, petitioner here was the plaintiff in the trial court, and respondent was defendant. Petitioner's claim was that respondent—a general agent for a common carrier—was liable as a common carrier for the acts of a carrier not a party to the action. The jury was so instructed, and returned a verdict for petitioner. Respondent filed a motion for judgment n.o.v. which was denied. On appeal, the Court of Appeals ordered the trial court to enter judgment for respondent on the ground that there was no evidence by which the theory of petitioner's case had been established; to-wit, that respondent was not a common carrier. This Court upheld the holding of the Court of Appeals regarding legal sufficiency of the evidence, but ordered that the direction to enter judgment be eliminated, stating:

> "As there were suggestions in the complaint and evidence of alleged liability of respondent to petitioner for respondent's own negligence while acting as general agent, this direction should not have been given." *Weade v. Dichmann, Wright & Pugh*, 337 U.S. 801, 809.

No where in *Weade* is any mention made of the power of the Court of Appeals to reverse and remand for dismissal—merely that since in that case it appeared from the pleadings and the evidence that even if the Court of Appeals was correct in ruling that respondent was not a common carrier, there was nevertheless the possibility that petitioner might establish independent acts of negligence on the part of respondent; hence the case should not have been dismissed by the Court of Appeals. Concerning this point, it is of utmost significance that petitioner here makes no claim or showing or contention that there exist in the pleadings or evidence any grounds

for liability other than those upon which the case was tried in the trial court or reviewed by the Court of Appeals. On the contrary, petitioner here still seeks only affirmance of the trial court judgment, and nothing else.

Concerning *Cone, Globe* and *Weade,* petitioner in her brief states only that those cases establish that she has been deprived of her right to seek a new trial. Such an unsuppported statement has basis neither in the cases themselves nor in the provisions of Rule 50 (as amended) and as it existed at the time this case was tried. In none of the cases is any statement made that under no circumstances can the Court of Appeals remand a case for dismissal. The thrust of *Cone* and *Globe* is, we respectfully submit, that before a party can obtain judgment of dismissal from the Court of Appeals, he must first request the trial court for such a judgment below. This is sound, because the trial court saw and heard the witnesses. *Weade* says that the Court of Appeals has power to reverse for legal insufficiency of evidence—and even affirms the Court of Appeals in that connection—and in effect makes no ruling at all concerning the effect of Rule 50. Petitioner has, we respectfully submit, utterly failed to connect the three cited cases to the instant case; in fact, as we have pointed out before, petitioner does not appear serious about a new trial at all, but talks only about affirmance of the trial court judgment. Neither *Cone* nor *Globe* nor *Weade* support petitioner in this. Finally, petitioner says absolutely nothing about her admitted failure to assert grounds for new trial in her Court of Appeals brief. She asserted no grounds there and she asserts no grounds here except to state (Page 13 of her brief) that she should have a new trial because of "errors committed by the trial court and heretofore not enumerated."

If petitioner is correct that she is entitled to a new trial under the circumstances of this case, then these matters would never end, since the function of the Court of Appeals would be limited either to affirmance or to the granting of a new trial—a rather limited function for an appellate court, we submit. In effect, a plaintiff could keep trying and re-trying his case until he finally achieved affirmance from the Court of Appeals—and the opposing party would have almost no rights at all.

To conclude this portion of the brief, we respectfully submit that since petitioner did not assert grounds in the Court of Appeals for new trial—which she had a perfect right to assert in accordance with Rule 50(d)—she has no basis for contending in this Court that her rights to seek a new trial have been taken from her. *Cone, Globe* and *Weade* do not sustain petitioner in this regard (1) since they are distinguishable on their facts and (2) because they were decided before the 1963 amendment to Rule 50.

C. WHETHER THE COURT OF APPEALS ERRED IN ORDERING THE DISTRICT COURT NOT MERELY TO ENTER JUDGMENT N.O.V. FOR RESPONDENT BUT TO DISMISS PLAINTIFF'S CASE IN VIEW OF RULE 50 (c) (2) OF THE FEDERAL RULES OF CIVIL PROCEDURE WHICH GIVES A PARTY WHOSE VERDICT HAS BEEN SET ASIDE THE RIGHT TO MAKE A MOTION FOR NEW TRIAL NOT LATER THAN 10 DAYS AFTER ENTRY OF THE JUDGMENT NOTWITHSTANDING THE VERDICT?

What we have said in Part II above does, we believe, establish that since Rule 50 (c) (2) applies only to situa-

tions where the trial court grants a motion for judgment n.o.v. after a jury trial, and is therefore inapplicable here where the motion for judgment n.o.v. was denied.

Although Rule 50 as amended refers occasionally to appellate procedures, its real purpose is, we respectfully submit, to permit the trial judge who saw the witnesses and heard the testimony an opportunity to reconsider the case upon its completion and remedy any errors which may then be found to exist. Although a trial court undoubtedly has power on its own motion to remedy errors committed during the trial, it seems clear that before Rule 50 can be applied, a motion for directed verdict must first be made during the trial itself and either a motion for new trial and/or a motion for judgment n.o.v. be made within 10 days following the trial. In other words, before a party can seek the protection of Rule 50 he must first file certain motions both during and after the trial. In the absence of any such motions, certainly, a party has no right to complain that he was not afforded the relief to which the Rule might have entitled him.

We have already pointed out that insofar as Rule 50(a) is concerned, respondent did move for a directed verdict at the proper time and in the proper manner; that insofar is Rule 50(b) is concerned, respondent did move for judgment n.o.v. at the proper time and in the proper manner; and that both motions were denied. We have already pointed out that since the motion for judgment n.o.v. was denied, the provisions of Rule 50(c) do not apply; and that there was certainly no reason at that point and under that part of the rule for petitioner to then file a motion for new trial, since petitioner was simply not a "party whose verdict has been set aside on

motion for judgment notwithstanding the verdict" as Rule 50(c)(2) provides. Furthermore, even if the motion for judgment n.o.v. had been granted in this case and even though petitioner had not moved for a new trial under Rule 50(c)(2), she would have been entitled on her appeal from the judgment n.o.v. not only to urge that the judgment be reversed and judgment entered on the verdict; but also that errors were committed during the trial which at the least entitled her to a new trial. This latter possibility is discussed in the *Notes of Advisory Committee on Rules*, 28 U.S.C.A. Rules 34 to 51 (1965 Pocket Part) Pg. 184-185.

In the absence of Rule 50(d) it might possibly be argued that the reversal by the Court of Appeals with instructions to dismiss might amount to the setting aside of a verdict "on motion for judgment notwithstanding the verdict" and that the loser on appeal be given an opportunity to ask for new trial under Rule 50(c)(2) after remand to the trial court. However, since Rule 50(d) specifically covers this point and provides the right to urge new trial in the Court of Appeals, Rule 50(c)(2) simply does not apply.

We have already established that Rule 50(d) clearly and unequivocally gave petitioner in this case an opportunity to present in the Court of Appeals grounds entitling her to a new trial should that court reverse the case. Certainly by exercising this right, petitioner could still have urged that the judgment be upheld. A statement to this effect appears in *Notes of the Advisory Committee* just referred to. But petitioner made no such request in the Court of Appeals, and in so doing has, we submit,

waived her right to make any further request for new trial at this point.

When Rule 50(c) is read in conjunction with Rule 50(d), the conclusion just reached seems inescapable. If motion for judgment n.o.v. is granted then the other party has a right to move for a new trial in the trial court. If motion for judgment n.o.v. is denied, then the other party has the right to move for a new trial in the Court of Appeals. No provision is made for moving for a new trial in both courts under the same circumstances. Logic and expediency also justify this conclusion. In the first instance, the appellate court will have had the benefit of the trial court's thoughts on the necessity of a new trial. In the second instance the appellate court will have the benefit of appellee's thoughts concerning new trial at the time it considers the entire case, and if it concludes that a new trial is not justified can end the controversy once and for all. In neither instance is the Court of Appeals prevented from ordering a new trial since Rule 50(d) specifically grants this power to said court.

In her brief, petitioner for all practical purposes ignores this point, stating only that had the trial court granted the motion for judgment n.o.v. she could have sought a new trial. Petitioner says absolutely nothing about her failure as appellee in the Court of Appeals to urge new trial in the event of reversal. The fact of the matter is that petitioner asked only for affirmance in the Court of Appeals, and for all practical purposes seeks only affirmance here as is clearly evident from her conclusion at Page 15 of her brief.

To conclude this portion of the brief, we respectfully

submit that since the trial court denied rather than granted respondent's motion for judgment n.o.v., the provisions of Rule 50(c)(2) do not apply, and that it was clearly incumbent upon petitioner to assert grounds for new trial as appellee in the Court of Appeals. Having failed to make such request there she is in no position to claim the right to make further request for new trial.

D. WHETHER RULE 38(a) OF THE FEDERAL RULES OF CIVIL PROCEDURE AND THE SEVENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES PRECLUDE THE COURT OF APPEALS FROM INSTRUCTING THE TRIAL COURT TO DISMISS AN ACTION WHEREIN THE PLAINTIFF OBTAINED A JURY VERDICT IN THE DISTRICT COURT AND THE DISTRICT COURT THEREAFTER DENIED DEFENDANT'S MOTION FOR NEW TRIAL AND DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND ENTERED JUDGMENT FOR PLAINTIFF?

Petitioner argues that since she obtained a jury verdict in the trial court, the order of the Court of Appeals directing the trial court to dismiss the action violated the Seventh Amendment and Rule 38(a) of the Federal Rules of Civil Procedure. At least since the adoption of Rule 50 of the Federal Rules of Civil Procedure in 1938 this is not the law in the Federal courts.

Prior to 1913, the Federal courts appellate recognized and granted judgments n.o.v. usually subject to whatever restrictions were imposed on the granting of such judgments by the state in which the Federal trial court sat. However, in 1913 this Court held in *Slocum v.*

New York L. Ins. Co., 228 US 364, that a direction by the Court of Appeals to the trial court to enter judgment for the defendant notwithstanding a verdict for plaintiff, for the reason that there was insufficient evidence to support the verdict, was an infraction of the Seventh Amendment, notwithstanding that the trial court erred in refusing to direct a verdict for the defendant as requested. The case was remanded by this court for new trial in the District Court.

Slocum did not, however, affect the rule at common law that a judgment n.o.v. could be granted where plaintiff's pleadings, even if true, disclosed no right of recovery. See *Annotation* in 85 *L.ed* 155, 156-158.

Two devices were thereafter invoked to avoid the effect of the rule in *Slocum*, both of which were approved by this Court. The more commonly used of these devices was the common-law method of reserving decision on a question of law until after the jury had rendered its verdict; that is, where a motion for directed verdict, dismissal, or the like was made at the close of the evidence. This latter device was approved by this Court in *Baltimore & C. Line v. Redman*, 295 US 654, where a decision of Court of Appeals reversing a District Court judgment and remanding the case to the trial court for a new trial for insufficiency of the evidence, was modified by this Court by directing an order of dismissal rather than a new trial in the District Court. In that case, the trial court reserved its decision on defendant's motion for directed verdict at the close of the evidence and submitted the case to the jury subject to the question reserved and thereafter received a jury verdict for plaintiff. Later the trial court ruled the motion for directed verdict ill-grounded and entered judg-

ment for plaintiff on the verdict. Defendant appealed with the aforementioned result. Concerning the relationship of this device to the Seventh Amendment, this Court stated as follows:

> "At common law there was a well-established practice of reserving questions of law arising during trials by jury and of taking verdicts subject to the ultimate ruling on the questions reserved; and under this practice the reservation carried with it authority to make such ultimate disposition of the case as might be made essential by the ruling under the reservation, such as non-suiting the plaintiff where he had obtained a verdict, entering a verdict or judgment for one party where the jury had given a verdict to the other, or making other essential adjustments. Fragmentary references to the origin and basis of the practice indicate that it came to be supported on the theory that it gave better opportunity for considered rulings, made new trials less frequent, and commanded such general approval that parties litigant assented to its application as a matter of course. But whatever may have been its origin or theoretical basis, it undoubtedly was well established when the Seventh Amendment was adopted, and therefore must be regarded as a part of the common-law rules to which resort must be had in testing and measuring the right of trial by jury as preserved and protected by that amendment. This Court has distinctly recognized that a Federal court may take a verdict subject to the opinion of the court on a question of law, and in one case where a verdict for the plaintiff was thus taken has reversed the judgment given on the verdict and directed a judgment for the defendant. (Chino-

weth v. Haskell, 1830, 3 Pet US 92 7 L.ed 614).''
Baltimore and C. Line v. Redman, 295 US 654, 659-661.

Subsequent to *Redman, Rule* 50(b) Federal Rules of Civil Procedure was adopted. This rule, we submit, approved the procedure laid down in *Redman* and in addition rendered automatic the reservation by the trial court of its decision on a motion for directed verdict. Concerning the purpose of Rule 50(b) this Court made the following statement in *Montgomery Ward & Company v. Duncan,* 311 US 243, 250:

> ''The rule was adopted for the purpose of speeding litigation and preventing unnecessary retrials. It does not alter the right of either party to have a question of law reserved upon the decision of which the court might enter judgment for one party in spite of a verdict in favor of the other. Prior to the adoption of the rule, in order to accomplish this it was necessary for the court to reserve the question of law raised by a motion to direct a verdict. The practice was an incident of jury trial at common law at the time of the adoption of the Seventh Amendment to the Constitution.''

Although this Court has not to our knowledge, specifically ruled as to whether Rule 50(b) is in violation of the Seventh Amendment, it would appear from the language of the cases cited above that since the result achieved by Rule 50(b) was incident to jury trials prior to the adoption of the Seventh Amendment, the rule does not deny parties litigant any constitutional rights. We also point out that the constitutionality of Rule 50(b) was upheld in *Brunet v. S. S. Kresge* (CCA 7th) 115 F.(2d) 713 on facts similar to those involved in *Slocum.*

What we have said above renders completely inapplicable the case of *Crim v. Handley,* 94 US 652 cited by petitioner in her brief. That case was decided in 1877, long before *Redman,* and long before the adoption of Rule 50(b) of the Federal Rules of Civil Procedure. Furthermore, in *Grim* nothing is said about any reservation of decision by the trial court and we assume no such reservation was made. The same holds true for *Metropolitan R. Co. v. Moore,* 121 US 558, decided in 1886, and for *Fairmount Glass Works v. Coal Co.,* 287 US 474 decided in 1932, both of which are cited in petitioner's brief. In neither of the latter cases was the point here under consideration even an issue under consideration. As for *Tennant v. Peoria & P.U. Ry. Co.,* 321 US 29, suffice it to say that it has nothing whatsoever to do with the right to trial by jury, nor does it in any way question the power of a trial court to grant a directed verdict or the power of an appellate court to reverse for insufficiency of evidence. The case holds that where the evidence is sufficient to sustain the verdict of the jury, it is improper for an appellate court to re-weigh the evidence and substitute its own conclusions for those of the jury. In *Tennant,* the evidence was conflicting, and this Court properly held that the Court of Appeals had no right to reach its own conclusions as to what happened. Legal sufficiency or insufficiency of the evidence formed no part of the ruling of the Court of Appeals, and it is also interesting to note that in *Tennant,* the following statement *is* made about legal insufficiency of evidence:

> "Petitioner was required to present probative facts from which negligence and causal relation could reasonably be inferred. The essential requirement is that mere speculation be not allowed to do duty for proba-

tive facts . . . ." *Tennant v. Peoria & P.U. Ry. Co.*, 321 US 29, 32-33.

To conclude this portion of our brief, we respectfully submit that the actions of the Court of Appeals—as well as the actions of the trial court—were in conformance with Rule 50 and were not in violation of the Seventh Amendment to the Constitution of the United States.

E. WHETHER THE COURT OF APPEALS CORRECTLY HELD THAT PLAINTIFF FAILED TO ESTABLISH EITHER THE NEGLIGENCE OF THE DEFENDANT OR THE PROXIMATE CAUSE OF THE ACCIDENT WHICH RESULTED IN THE DEATH OF PLAINTIFF'S DECEDENT?

This question was neither presented nor argued in petitioner's Petition for Writ of Certiorari hereinbefore filed. On the contrary, the only question presented in said Petition was whether Rules 50(d) and 38(a) Federal Rules of Civil Procedure and the Seventh Amendment to the Constitution of the United States precluded the Court of Appeals from remanding the case to the District Court with instructions to dismiss (Page 2 of the Petition). Nothing therein challenged the rulings of the Court of Appeals with regard to the legal insufficiency of petitioner's evidence in the trial court. The only argument advanced by petitioner in said Petition was that the Court of Appeals was without power to remand the case for dismissal by the District Court.

Now that certiorari has been granted, petitioner argues for the first time in this Court that the Court of Appeals incorrectly ruled on the legal insufficiency of

the evidence. In fact, we believe it a fair statement that viewed as a whole, petitioner's brief on the merits concerns itself not with the power of the Court of Appeals but rather that the Court of Appeals incorrectly held that petitioner's evidence in the trial court was legally insufficient to establish either negligence or proximate cause. We do not perceive this issue to be properly before this Court, but since petitioner has devoted almost her entire brief to this subject, we cannot allow her statements thereon to go unanswered.

At the outset, it should be kept in mind that the Court of Appeals did not, as petitioner suggests, invade the province of the jury; nor did the Court of Appeals search the record for evidence which would take the case away from the jury. What the Court of Appeals did do —and this is clear from its entire opinion (R. 88-94) and in particular from its conclusion (R. 94)—was to hold that the record before it wholly failed to disclose sufficient evidence to establish either negligence or proximate cause. This the Circuit Court did from undisputed facts viewed in the light most favorable to the petitioner. The language used by the Court of Appeals clearly illustrates the basis upon which the case was reversed:

> "*Viewing the evidence in the light most favorable to the plaintiff,* it establishes only that on the day in question Eby's employees were directed to modify a platform or scaffolding so that it would not interfere with certain critical measurements that had to be made within the silo; and that Eby's employees made the necessary changes . . . *There is no evidence of the cause of Neely's fall.* The uncontradicted evidence does show that the platform did not break, that the

railing did not break, and that there were no grease spots on the platform upon which he might have slipped. *In short, the most that the evidence establishes is that Neely was on a platform constructed by Eby's employees at the time he fell.* (R. 92) (Emphasis added)

• • •

"We conclude that the record wholly fails to disclose sufficient evidence to establish either negligence on Eby's part or, assuming such negligence, that it was the proximate cause of Neely's death." (R. 94)

The power of the Court of Appeals to reverse a District Court judgment for legal insufficiency of evidence is not challenged here; nor would there be any basis for such a challenge under the cases cited previously in this brief. We are not, therefore, dealing with whether the Court of Appeals had the power to reverse, but whether the evidence adduced in the trial court was sufficient as a matter of law to sustain the verdict of the jury. The record clearly establishes that the evidence was not sufficient.

As plaintiff in the trial court, petitioner had the burden of proving (1) that respondent was negligent with regard to the platform and (2) that this negligence proximately caused the death of Neely. Petitioner proved neither. She failed to establish anything more than that respondent constructed and/or modified a platform as requested by the day silo captain (R. 15-16), that Neely was seen on or getting onto the platform a few moments before his death (R. 58-59) and that shortly thereafter was seen falling through the air to his death. If this be a prima facie case of negligence and causation, then the mere happening of an accident would automatically raise

a presumption of negligence. Such is not the law in Colorado. *Drake v. Lerner Shops of Colorado, Inc.*, et al., 145 Colo. 1, 357 P.(2d) 624.

Petitioner did not offer any evidence whatsoever as to how or why Neely fell, but she takes the position that merely because Neely was last seen alive on the platform, the platform must have had something to do with his fall. The uncontradicted evidence was that the platform did not break, that the railing did not break, and that there were no grease spots on the platform. The pictures to which petitioner refers in her brief (Exhibits 1, 2, 3, 5 and 10) were before the Court of Appeals when it considered the case on appeal, and they clearly establish that the platform did not fail. There is no evidence that the presence or absence of the railing had anything to do with the accident; in fact it would seem logical that if anything the railing would have prevented rather than caused Neely to fall. There is no evidence that Neely tripped or stumbled or slipped due to any improper construction or maintenance of the platform; this despite the fact that two other millwrights beside Wilhoit and Neely were present at the time of the accident but were not called to testify. There is no evidence that the size of the platform caused Neely to fall. Neely stated just before his death that everything was under control when asked how things were going at which time he was physically standing on the platform. In short, the most that the evidence established was that Neely was on the platform at the time he fell. There is no evidence of the cause of Neely's fall.

Only by conjecture, speculation or surmise could the jury have found either negligence or causation in this case. One cannot sustain the burden of proof as to either negli-

gence or causation in Colorado upon such evidence, as appears from the following statement from *Gordon v. Clotsworthy*, 127 Colo. 377, 257 P.(2d) 410, 411:

> " . . . To be liable, the defendant in this case must be shown to have been negligent in some act or omission which proximately caused plaintiff's injury. The burden of proof of negligence rests upon the party who asserts it, and such burden cannot rest on surmise, speculation or conjecture, but must be grounded on substantial evidence. *Coakley v. Hayes*, 121 Colo. 303, 306, 215 P.(2d) 901"

To the same effect see *Letts v. Iwig*, 153 Colo. 20, 384 P.(2d) 726, and *Perry Lumber Co. v. Ruybal*, 133 Colo. 502, 297 P.(2d) 531.

The following statement by this Court in *Moore v. Chesapeake and Ohio Railway Co.*, 340 US 573, 577-78, is signifcant in this regard:

> "To sustain petitioner, one would have to infer from no evidence at all that the train stopped, where and when it did for no purpose at all, contrary to all good railroading practice, prior to the time decedent fell, and then infer that decedent fell because the train stopped. This would be speculation run riot. Speculation cannot supply the place of proof. Galloway v. United States, 319 US 372, 87 L.ed 1458, 63 S. Ct. 1077."

But even assuming for the purpose of argument and nothing more that the jury could have, by inference, found some sort of negligence on the part of respondent with regard to the construction of the platform—condition of the

floor, railing unnecessary, platform too small—it by no means follows that petitioner would be entitled to recover, since, under Colorado law, proof of negligence alone is insufficient to impose liability. Colorado law requires that *proximate cause* as well as negligence must be established. The record is absolutely devoid of evidence as to the proximate cause of Neely's fall. This was clearly recognized by the Court of Appeals in its opinion, wherein this statement was made (R. 94):

> " . . . In this case, the *undisputed facts* show a *total lack of competent evidence* to connect the fall by Neely with the alleged negligence on Eby's part. There is no adequate showing of a causal connection between the alleged smallness of the platform or the location of the railing or the lack of additional railings and Neely's fall. It may, of course be conceded that the platform might possibly have had something to do with his fall, but there is nothing in the record to show what it was." (Emphasis added)

That proximate cause as well as negligence must be established in Colorado appears in *Mosko v. Walton*, 144 Colo. 602, 358 P.(2d) 49. There the plaintiffs contended that their building was damaged by defendant's negligence in the continued use of a leaking water pipe. Plaintiffs were awarded $20,000.00 in the trial court and the Supreme Court reversed. The only question discussed by the Colorado Supreme Court in its opinion was whether the negligence of the defendants was a proximate cause of plaintiffs' damages. The court held that proximate cause had not been established. In *Mosko*, the Colorado Supreme Court first observed that there was competent testimony to establish that the pipe was in fact leaking at

the times compiained of and that the defendants knew it —in other words, the Court in effect conceded evidence of negligence has been established. However, the Court held that there was a complete lack of competent evidence to connect the leak in question with the damage to plaintiffs' property. The Court's words to this effect are as follows:

> "The state of the evidence here is that the water line was negligently maintained, but that no adequate showing was made of a causal connection between such negligence and plaintiffs' damages . . . To hold them liable without a reasonable showing that their negligence contributed to the plaintiffs' loss is contrary to the law. . . . Their negligent act or omission must have been such that without it the injury would not have occurred. . . . The rule of proximate cause requires proof that but for the defendants' negligence the damage would not have occurred. . . . Where the evidence, as here, presents no more than an equal choice of probabilities, it is not substantial. . . . 'No number of mere possibilities will establish a probability . . .'" *Mosko v. Walton*, 144 Colo. 602, 358 P.(2d) 49, 52.

Other Colorado cases reaching a similar result are *Stout v. Denver Park & Amusement Co.*, 87 Colo. 294, 287 P.(2d) 650; *Town of Lyons v. Watt*, 43 Colo. 238, 95 Pac. 949; and *Hook v. Lakeside*, 142 Colo. 277, 351 P.(2d) 261.

Not only did petitioner fail to prove proximate cause in the trial court; she similarly failed to establish negligence on the part of respondent. The only directions given by Blanchard to respondent's carpenter foreman was his

statement that a piece of wood was in the way of the measurement procedures and that the platform should be modified so that the measurements could proceed (R. 16). Although petitioner makes much argument about railings, uprights, handrails and the floor of the platform, it is significant to note that Blanchard said nothing about this subject. He did admit, however, that the platform was a temporary structure which would change from time to time as the work progressed (R. 39). It must not be forgotten that the positioning of the platform was dictated by the I-beam on the crib and the water pipe on the silo wall (R. 41), and that the platform was where Blanchard wanted it to be; also that because of the nature of the work to be done, it was not possible for the platform to touch the counterweights.

In the absence of any evidence as to what caused Neely to fall, it is impossible to state what part if any the platform played in the fall; nevertheless, the trial court left for the jury to determine whether or not respondent was negligent. In Colorado the giving of an instruction not supported by the evidence is error. In that connection, see *Fisk v. Greeley Electric Light Company*, 3 Colo. App. 319, 33 Pac. 70, 71, where this statement is made:

> "The instructions should in all cases be based upon the evidence and an instruction, no matter how correct the principal which it may announce, that impliedly assumes the existence of evidence which was not given is erroneous. It is calculated to bewilder and mislead the jury *by producing the impression that in the mind of the court, some such state of facts as the instruction supposes may be inferred from the evidence given, or concealed within it.*" (Emphasis added)

The Court of Appeals clearly recognized this when it stated in its opinion that although it may be conceded that the platform might possibly have had something to do with the fall, there was nothing in the record to show what it was.

When petitioner argues in her brief here that the jury might well have concluded this, that and the other thing about the platform might possibly have had something to do with the accident, she really places the cart before the horse, so to speak. Hers was the burden to establish proximate cause, and the law will not permit her to do this with only speculation, conjecture and surmise; otherwise the mere happening of an accident would infer negligence.

Petitioner also argues that the rule of circumstantial evidence applies here, citing two Colorado cases which are clearly distinguishable on their facts. In *Jasper v. City and County of Denver,* 144 Colo. 43, 354 P.(2d) 1028, there was positive evidence of a hole in the public cross-walk in which plaintiff found herself sitting immediately after her fall. The maintenance of the hole was clearly negligent and it was right in plaintiff's path. The fact that plaintiff did not positively state that the hole caused her to fall did not prevent the jury from finding that it did. Here, we have no established defect; nor do we have any evidence that any such defect caused Neely to fall. The situation was substantially the same in *Remley v. Newton,* 147 Colo. 401, 364 P.(2d) 581, also cited in petitioner's brief. There the tether-ball pole admittedly fell to the ground, and the minor plaintiff was found lying on the ground bleeding, his head only a few inches from the pole. Here, we have no evidence of failure; nor do we have evidence

that any such failure caused Neely to fall. Ours is not a situation where there are two equally plausible conclusions as to how the accident happened. We have no evidence at all as to how the accident happened. The fact that the jury found liability does not supply the insufficiencies in petitioner's case which have already been established. Finally, it should be noted that the Court of Appeals carefully considered the rule of circumstantial evidence in this case and found it inapplicable (R.93).

Whatever physical measurements appear deductible to petitioner in her brief from Exhibits 1, 2 and 3 must be considered in the light of the admitted fact that despite the angle from which the pictures were taken, the platform—even as portrayed in the pictures—is only two feet above the counterweights on the vertical plane and not more than two feet away from the counterweights on the horizontal plane. More important however, is the fact that not one of the so-called conditions of the platform was in any way connected to the accident—except the very presence of the platform itself.

The remaining cases cited by petitioner at the top of Page 10 of her brief are for the most part FELA cases. This Court has previously stated that since these cases are based upon statutory rather than common law negligence, the power of decision is to be in the jury in all but those infrequent cases when fair-minded jurors cannot honestly differ. They do not question the power of the Court of Appeals to reverse. Ours is not an FELA case.

To conclude this portion of the brief, we respectfully submit that the conclusion of the Court of Appeals that the record failed to disclose sufficient evidence of either

negligence or proximate cause was both justified and proper, and did not as petitioner suggests constitute an improper invasion of the province of the jury.

VIII. CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals and the orders of the trial court in conformance therewith be affirmed.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 12

SANDRA LEE NEELY, by her legal representative and guardian, Cecile V. Neely,

Petitioner,

vs.

MARTIN K. EBY CONSTRUCTION CO., INC.

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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ARGUMENT

I. SINCE THE SEVENTH AMENDMENT LIMITS APPELLATE REVIEW OF A JURY HOLDING TO THE SCOPE OF REVIEW UNDER COMMON LAW, THE COURT OF APPEALS HAD NO POWER TO ENTER JUDGMENT FOR ONE PARTY DESPITE A JURY VERDICT AND JUDGMENT FOR THE OTHER.

The Judicial Code of 1948 (62 Stat. 963, 28 U.S.C. 2106) does not enlarge or shrink petitioner's rights under the Seventh Amendment to the United States Constitution.

Insofar as applicable here, 28 U.S.C. 2106 states that an appellate court may reverse or set aside a judgment of a trial court, remanding with directions to enter judgment. The Seventh Amendment says that Sandra Lee Neely is entitled to a trial by a jury in a federal court and that no fact tried to that jury shall thereafter be dealt with by any court other than according to the common law.

Assuming for the purpose of this portion of the argument that the plaintiff's case was totally deficient in proof of proximate cause and negligence (a concession which the petitioner has not made and will not make), nevertheless, we still must explore the common law in order to determine whether *appellate* courts operating from a cold transcript engaged in the practice of entering judgment for one party despite a jury verdict for the other.

Crim v. Handley, 94 U.S. 652, 657 says that the appellate courts had no such power. The respondent brushes *Crim* aside and indulges the assumption that *Baltimore & C. Line v. Redman*, 295 U.S. 654, settles the issue. A chronological review of the cases in point thus becomes necessary. Fervently, we hope that the following analysis of the state of the law will lead to a definitive decision for the guidance of the bench and bar.

Slocum v. New York Life Ins. Co., 228 U.S. 364, was a controversy arising out of a life insurance policy. At the close of all the evidence, the company requested a directed verdict which request the trial judge denied. A verdict was returned for the plaintiff. The company moved for judgment n.o.v. which motion was also denied. From judgment for the plaintiff, the defendant insurance carrier appealed, assigning as error the refusal of the trial court to direct a verdict and to grant judgment n.o.v. The appellate court reversed with directions to sustain the motion for judgment n.o.v. since, as a matter of law, there was no insur-

ance contract. This Court granted certiorari to decide whether or not the Court of Appeals erred in reversing the judgment and whether, if it did not err in so doing, it should have awarded a new trial instead of terminating the litigation by direction to enter judgment n.o.v. The Supreme Court observed that:

> ". . . when, on the trial of the issues of fact in an action at law before a Federal court and a jury, the evidence, with all the inferences that justifiably could be drawn from it, does not constitute a sufficient basis for a verdict for the plaintiff or the defendant, as the case may be, so that such a verdict, if returned, would have to be set aside, the court may and should direct a verdict for the other party." *supra* at 369.

The Supreme Court agreed with the opinion of the Court of Appeals that there was no basis in the evidence for a plaintiff's verdict, and then turned to the law of Pennsylvania, the state from which the controversy arose. The Court observed that state practice provided that where a trial court has ruled upon a motion for judgment *non obstante veredicto*, the losing party may appeal, and the reviewing court shall then enter such judgment as the evidence may require. The Supreme Court agreed with the Court of Appeals that it had the power under Pennsylvania procedure to review the denial of the motion for judgment n.o.v., but determined that direction of judgment by the Court of Appeals rather than the ordering of a new trial, was a violation of the Seventh Amendment. The Supreme Court modified the judgment by eliminating the direction to enter judgment and substituting a direction for new trial.

Soon after *Slocum* the Court decided *Young v. Central R.R. of N.J.*, 232 U.S. 602. There the administratrix of the estate of Young sued to recover under the Federal Employers Liability Act for the death of her husband. Again,

the Supreme Court conceded the accuracy of the Circuit Court's analysis that there was insufficient showing of negligence to submit the case to a jury. But the Court modified the judgment by eliminating the direction to enter judgment for the defendant n.o.v. and substituted a direction for a new trial. The only precedent cited by the Court was *Slocum*.

Then came *Baltimore & C. Line v. Redman*, 295 U.S. 654, wherein under somewhat similar circumstances, the Court modified a judgment of a Court of Appeals by substituting a direction for a judgment of dismissal in place of a direction for a new trial. On its face, the *Redman* decision would appear to be a formidable barrier to the relief sought by Sandra Lee Neely. The respondent relies heavily upon this decision in its answer brief. But when the case is held to the light, it appears to have flaws in its fabric.

For example, the Court cites *Chinoweth v. Haskell*, 3 Pet. 92, as a case wherein a verdict for the plaintiff was reversed and judgment directed for the defendant in this Court (295 U.S. at 661). However, on reading the case and the comment thereon which appears on page 391 of *Slocum*, we discover that in *Chinoweth* there was a demurrer thus reducing the question to one of law alone. If the case were not distinguishable on that basis, how else could two cases such as *Chinoweth* and *Parsons v. Bedford*, 3 Pet. 433, occupy the same volume of the Reports? Nor is *Chinoweth* a part of the common law since it was decided forty-one years after 1791. Additionally, it does not appear that the prohibition of the Seventh Amendment was considered in that opinion. The Court in *Redman* observed:

> "At common law there was a well established practice of reserving questions of law arising during trials by jury and of taking verdicts subject to the ultimate ruling on the questions reserved; and under this practice the reservation carried with it authority to make such ultimate disposition of the case as might be made essential by the ruling under the reservation, such as non-suiting the plaintiff where

> he had obtained a verdict, entering a verdict or judgment for one party where the jury had given a verdict to the other; or making other essential adjustments." 295 U.S. at 659.

We have no quarrel with this as an abstract statement and, as such, it is unquestionably supported by the cases footnoted at 295 U.S. 659. But this distinction is of paramount importance: Nothing either in the quotation set forth above, or in the English cases cited in the footnote, indicates that appellate courts were in any way involved, since the procedure discussed pertained only to the trial court sitting *en banc*.

We examined the English common law decisions in order to try to find a single case wherein any appellate court took it upon itself from an examination of a cold record, to render a decision depriving a verdict-winner of the fruits of the verdict and terminating the litigation or ordering it terminated. We were unable to find any such case in the common law. We did find cases like those cited in the *Redman* footnote where verdicts were returned on circuit with the reservation of difficult questions of law which that judge then brought to his brother judges *en banc* at Westminster so that he might have their assistance in solving such questions. At the very least, the trial judge was a participant, sitting with his peers so that the court *en banc* had the advantage of at least the personal contact and observations of one judge who had presided in the courtroom while the trial progressed on its merits. It appears that this was a voluntary submission of the reserved question and it was as though the judge with a knotty problem of law were requesting his fellows to sit with him in chambers and to assist him. This procedure is described in Radcliffe and Cross, The English Legal System (London, 1937), pp. 170-171 and in Kiralfy's The English Legal System (London, 3rd ed. 1960), p. 150.

The Supreme Court cited *Slocum* as authority in *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, and rejected *Redman* as

inapplicable because of a procedural difference. Therein the Court said flatly:

> "The Circuit Court of Appeals had jurisdiction to reverse and remand for new trials but was without power, consistently with the Seventh Amendment, to direct the trial court to give judgments for plaintiff." 301 U.S. at 394.

We believe we detect in *Kennedy* an uneasiness with the holding in *Redman* and a reluctance to allow appellate termination of jury cases by reversing and dismissing on the record. This whisper of doubt rises to a crescendo in later cases as we shall see.

In *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, this Court had occasion to construe Rule 50(b) of the then new Federal Rules of Civil Procedure and used language which would appear on its face to be directly contradictory to the above quotation from *Kennedy*. In *Duncan* the Court said:

> "The appellate court may reverse the former action *and itself enter judgment n.o.v.* or it may reverse and remand for a new trial for errors of law." 311 U.S. at 254, emphasis supplied.

However, it will be noted that in *Duncan*, this Court was not construing the application of the Seventh Amendment to the procedure under Rule 50. The question which the Court decided was whether or not the granting of a verdict-loser's motion for judgment n.o.v. by the trial court eliminated the necessity for that court to also rule upon the motion for new trial filed by the same losing party. There was no occasion to reach the fundamental constitutional issue involved in the instant appeal.

The oft-cited dissent by three justices in *Galloway v. United States*, 319 U.S. 372, is of great revelance here. Therein it was stated:

> "In 1830, this Court said: 'The only modes known to the common law to re-examine such facts, are

the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable; or the award of a *venire facias de novo*, by an appellate court, for some error of law which intervened in the proceedings.' *Parsons v. Bedford, supra*, at 448. That retrial by a new jury rather than factual re-evaluation by a court is a constitutional right of genuine value was restated as recently as *Slocum v. New York Life Insurance Co.*, 228 U.S. 364." 319 U.S. at 400.

Although that dissent was written twenty-seven years ago, we believe that the instant submission represents the first time this Court has had an opportunity to resolve the apparent conflict between *Slocum* and *Redman* and to delineate the extent to which an appelate court can go in disposition of a controversy brought before it on review.

In summary, the petitioner states her belief that the footnote cases cited in *Redman* in support of a supposed common law power of the appellate court do not, in fact, establish that the procedure which *Redman* condoned ever did exist in the common law. If the foundations of *Redman* are accurately challenged, then the guidance of this Court is needed so that appellate courts and those lawyers who practice before them will know that *Crim, Parsons, Slocum,* and *Kennedy* rather than *Redman* delineate the scope of appellate power.

The record in the trial court in this case is replete with testimony of witnesses describing photographs and the blackboard drawing with such phrases as "this area", "this side", "this point", etc. These explanatory phrases were accompanied by gestures which do not appear in the appellate record. No doubt, some meaning also must have been conveyed to the triers of the fact by means of vocal pauses and emphasis. In order to reach a conclusion that "the facts show a total lack of competent evidence to connect the fall by Neely with the alleged negligence on Eby's part . . ." (R. 94), it was necessary for the appellate court

to canvass *all* of the evidence. Considering the complexity of the facts, can this be done by one who did not attend the trial?

Another problem with review of a cold record arises from the danger of misunderstanding the testimony, *Cone v. West Virginia Paper Co.*, 330 U.S. 212. Was the court of Appeals correct when it declared:

> "Blanchard also testified that when he left the area it was well lighted." (R. 90)

The testimony from Mr. Blanchard was actually quite different:

> "Q. This area was well lighted at the time, was it not?
>
> "A. It had the permanent silo lights, plus some extension cords.
>
> "Q. Well, it wasn't dark in there?
>
> "A. Well, it isn't as well lighted as this is right here." (R. 39)

All one can conclude fairly from this testimony is that the area in which Neely's fall occurred was not as well lighted as the courtroom in which the case was tried.

There are other apparent discrepancies between the trial record and the recounting of the facts as they appear in the decision of the Court of Appeals. We are told the following:

> "The day silo captain, or millwright foreman, Blanchard, discovered that it was too large and interfered with the measurements that had to be taken from a drive locking mechanism *at the bottom of the silo* and the counterweight locking mechanism located about 6 feet below the top of the silo." (R. 90) emphasis supplied.

To be precise, the testimony was that the measurements were to be made from the locking device down to

the locking pin centered on the counterweight (R. 15, 56). The distance involved in the measurement was only about six feet (R. 24, 32).

Again, common sense may very well dictate that the missile itself had not been installed in the crib (R. 90); but this fact, if it be a fact, is something that the petitioner has been unable to locate in the printed record.

The petitioner makes these observations only to support her contention that an appellate court, working from a cold record, cannot possibly have as complete an understanding of the evidence as would the judge and jury who sat in the courtroom for three days observing the witnesses, observing their gestures, listening to their voices as they punctuated testimony by vocal inflection—these are all brush strokes which blend into the completed painting which we call "a trial".

Assuming for the purpose of this argument that the interpretations of the evidence made by the Court of Appeals in this case are all absolutely accurate, or that any errors are without substance; nevertheless, a decision that it is proper for the Court of Appeals to engage in this kind of fact-review might very well result in injustice in some other case.

This must have been one of the compelling reasons why the Seventh Amendment insisted upon control and limitation of appellate review of facts tried to juries.

II. CAN WE GLEAN FROM THE POST-WAR DECISIONS INTERPRETING RULE 50, A CONSISTENCY OF ATTITUDE TOWARD TERMINATION OF LITIGATION BY JUDGMENT AT THE APPELLATE STAGE AGAINST THE JURY-VERDICT-WINNER BELOW?

Cone v. West Virginia Paper Co., 330 U.S. 212, dealt with the limited question of the power of an appellate court under Rule 50(b) to reverse and dismiss under circumstances where the verdict-loser had failed to move for judg-

ment n.o.v. in the trial court. In an unanimous opinion, this Court reversed the holding of the Court of Appeals. The Court noted that such a procedure would effectively foreclose the verdict-winner (the plaintiff) from obtaining a new trial in order that he might repair any evidentiary gaps which might have existed in his case. The Court did not discuss any constitutional issue in its decision.

In *Globe Liquor v. San Roman*, 332 U.S. 571, the Court extended the rationale of the *Cone case* to a situation wherein both sides had moved for directed verdicts and the Court had granted one. On appeal, after the Circuit Court had reversed and remanded with instructions to enter judgment for the verdict-loser below, the Supreme Court quoted the following language from *Cone*:

> " 'Determination of whether a new trial should be granted or a judgment entered under Rule 50(b) calls for the judgment in the first instance of the judge *who saw and heard the witnesses and has the feel of the case which no appellate* printed transcript can impart.' " 332 U.S. at 574, emphasis supplied.

Agreeing with that much of the Circuit Court's opinion as dictated a reversal, this Court, nevertheless, modified the judgment and ordered a new trial.

Weade v. Dichmann Co., 337 U.S. 801, was a tort action brought by passengers against an agent employed by the United States to manage a ship owned by the government. The plaintiffs' theory was that the defendant owed the highest degree of care as a common carrier. On this theory a verdict for the plaintiffs was returned. The defendant failed to except to the instructions as to quantum of care. The trial court denied the verdict-loser's motion for judgment n.o.v. and an appeal followed. The Court of Appeals, determining that the defendant did not owe the duty of care as described in the instructions and upon which the plaintiffs' case rested, reversed with instructions to enter judgment for the defendant. The Supreme Court, agreeing

that the defendant was not a common carrier, nevertheless, ordered the direction modified so as to permit the plaintiffs to proceed on another theory.

Johnson v. New York, N.H. & H.R. Co., 344 U.S. 48 was a Jones Act case. After the close of the evidence, the defendant moved to dismiss and for a directed verdict. The trial judge reserved decision and submitted the issue to the jury which found for the plaintiff. Judgment was entered and the defendant moved to set aside the judgment, but it did not specifically move for judgment n.o.v. From a denial of the defendant's motions it appealed. The Court of Appeals held that the motion for a directed verdict should have been granted and reversed the judgment. The petitioner, verdict-winner below, appealed to the United States Supreme Court contending that since the company had failed to move for judgment n.o.v., neither the trial court nor the appellate court had the power to enter such a judgment. In a decision which analyzes most of the cases described in this brief, the Court held that the company was entitled to no more than a new trial. The case was remanded for further proceedings consistent with this holding.

Of particular interest is the following comment:

> "Rule 50(b) was designed to provide a precise plan to end the prevailing confusion about directed verdicts and motions for judgments notwithstanding verdicts. State procedure was no longer to control federal courts as it had in the *Redman* and *Kennedy* cases." 344 U.S. at 52.

The four post-war decisions which we have just discussed indicate a consistent pattern of reluctance on the part of the Supreme Court to permit the Courts of Appeals to terminate cases at the appellate stage by judgments against the verdict-winners.

In *Cone, Globe Liquor* and *Weade* the Court did not mention the Seventh Amendment but concentrated instead

on Rule 50. In *Johnson* there was reference to the Seventh Amendment only in passing as the Court described the holdings in *Slocum* and *Redman*.

In 1963, Rule 50 was amended. As to section (d) of the Rule as it now stands, the advisory committee tells us:

> "Subdivision (d) does not attempt a regulation of all aspects of the procedure where the motion for judgment n.o.v. and any accompanying motion for a new trial are denied, since the problems have not been fully canvassed in the decisions and the procedure is in some respects still in a formative stage. It is, however, designed to give guidance on certain important features of the practice." Notes of Advisory Committee on Rules, 28 U.S.C.A. Rule 50, (1966 Pocket Part), p. 220.

It would appear that the change in Rule 50 resulted, at least in part, from the desire of the Court to reduce the uncertainties of appellate procedure which produced the decisions described in this section of our brief.

In our own case, for the first time since the *Galloway* dissent, we find the judicial microscope turned directly upon the relationship of procedural Rule 50 to the Bill of Rights.

III. UNDER THE NEW RULE 50(d) WHEN MUST THE VERDICT-WINNER ASSERT GROUNDS WHICH WOULD ENTITLE HIM TO A NEW TRIAL?

The petitioner, Sandra Lee Neely, received a verdict and judgment in her favor in the trial court which the judge refused to set aside. She received this verdict despite the fact that the court refused to allow two of her witnesses to testify as experts on the sufficiency of the scaffolding which Eby had built (R. 27-29, 59-60, 77). Even if there were no Rule 50(d), the holdings of *Grim, Slocum, Young, Kennedy, Duncan, Cone, Globe Liquor, Weade* and *Johnson* would dictate that the petitioner should be given a post-appellate-decision chance to keep her claim alive.

The respondent would interpret the new Rule 50(d) to restrict rather than to protect and expand the right to call attention to errors prejudicial to the verdict-winner. Eby's interpretation would require that the verdict-winner file a counter-motion for a new trial, detailing errors committed against his interest, even though he has won a verdict. Such a motion is unheard of and if that is what the Rule means then post-judgment practice has seen a most drastic change.

Obviously, the Rule is intended to assist the verdict-winner in protecting his rights and not losing them. Certainly he should not be required to plant judicial doubt upon the verdict by reciting to the Court other errors than those to which the loser calls attention. Nor do we believe that the framers of the new Rule intended to increase the burden of bench and bar by adding new and additional research, new motions and briefs to the burden of review when such research, motions and briefs would be entirely unnecessary if the rulings of the trial court were ultimately affirmed.

We believe that it is unnecessary under the new Rule 50(d) for the verdict-winner to assert grounds entitling him to a new trial until the appellate court should decide as a matter of law that he was not entitled to a verdict.

It becomes almost self-evident that the above-described procedure would be the most desirable and fair one, when we consider that if the trial judge were to set aside the verdict and to grant judgment n.o.v. when the motion first came before him, then the verdict-winner, at that stage, would have the right to file a motion for a new trial alleging error prejudicial to him. Such a procedure is traditional and unquestioned. Why then, should the verdict-winner find himself in a less protected position if the trial judge has denied the motion for judgment n.o.v. than if he has granted it?

It is pertinent at this point to comment briefly upon Rule 50(c). At first blush it might appear that the Court of Appeals has the power under this Rule to substitute its

judgment for that of the jury and to terminate the proceedings by orders entered at the appellate level, thus violating the Seventh Amendment as your petitioner interprets it. However, Rule 50(c) is only applicable after a judgment n.o.v. has been granted by the trial judge. It can never operate to deny to a verdict-winner the fruits of his verdict and thus end the lawsuit. The appellate court can terminate the litigation only by reversing the decision on the motion for judgment n.o.v. and refusing to uphold the conditional grant by the trial judge of a new trial to the verdict-loser. The effect of such procedure is to reinstate the jury verdict. Therefore, there is no violation of the Seventh Amendment.

CONCLUSION

Succinctly stated, the petitioner's position is as follows:

1. The verdict and judgment of the trial judge should be reinstated, because there is sufficient evidence to support it. (The petitioner has not re-argued this point in her reply brief, since she feels that it was adequately presented in her opening brief.)

2. Whether or not the Court of Appeals was correct in finding from the cold record that there was insufficient evidence to support the verdict, this Court should modify the judgment of the appellate court to require a remand for a new trial or to permit the submission of a new trial motion in the trial court by the petitioner.

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be reversed and that the verdict of the jury and the judgment of the

trial court be reinstated or for such other and further relief in the alternative as has been suggested herein.

Respectfully submitted,

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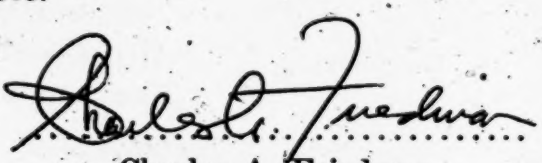
PROOF OF SERVICE

I, Charles A. Friedman, one of the attorneys for petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 11th day of January, 1967, I served a copy of the foregoing brief of the Petitioner on John C. Mott, Anthony F. Zarlengo, and Joseph S. McCarthy, attorneys for respondent, by mailing copies in duly addressed envelopes with proper postage prepaid, to John C. Mott, Esq., 1020 American National Bank Building, Denver, Colorado, 80202; Anthony F. Zarlengo, Esq., 595 Capitol Life Center, Denver, Colorado, 80203; and Joseph S. McCarthy, Esq., 745 Washington Building, Washington, D. C. 20005.



Charles A. Friedman

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 12

SANDRA LEE NEELY, by her legal representative and guardian, Cecile V. Neely,

Petitioner,

vs.

MARTIN K. EBY CONSTRUCTION CO., INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR RE-HEARING

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR RE-HEARING

Petitioner respectfully requests a re-hearing in the within matter for the following reasons:

I. THE PETITIONER OBVIOUSLY FAILED TO MAKE CLEAR TO THIS COURT THAT SHE WAS PRESERVING THE ISSUE OF THE SUFFICIENCY OF THE EVIDENCE.

In her Petition for Writ of Certiorari, Sandra Lee Neely stated:

> The petitioner does not concede for one moment that the trial court and the jury were wrong and that the appellate court was right in interpreting the evidence as to proximate cause and negligence.

The Supreme Court, in granting the writ, included in its Order Allowing Certiorari ". . . all questions presented by the petition".

In the belief that the Court was thus recognizing the issue of the sufficiency of the evidence as a point to be raised, the petitioner vigorously argued as the very first point in her brief on the merits that negligence and proximate cause were jury issues under the facts of this case. Again, the petitioner included this point as the very first paragraph of the "Conclusion" of her reply brief on the merits.

The petitioner made every attempt to preserve this issue which is so important to her and respectfully requests that this Court consider the issue of the sufficiency of the evidence as to proximate cause and negligence.

Your petitioner, without rehashing the evidence of the case, respectfully adopts that portion of the dissenting opinion of Mr. Justice Black which so succinctly develops this point.

II. THE COURT MISCONSTRUED THE IMPORT OF THE HENAGAN CASE.

This Court, in its Opinion, said:

> And in *New York, New Haven & Hartford R.R. v. Henagan*, 364 U. S. 441, this Court itself directed entry of judgment for a verdict loser whose proper request for judgment *n.o.v.* had been wrongly denied by the District Court and by the Court of Appeals.

However, when we examine the transcript of the record and the briefs in the *Henagan* case, we find that there was not the slightest doubt in the mind of the trial judge in that case that the evidence was insufficient to sustain a jury verdict. The only misapprehension of the trial court

was as to its own power to direct a verdict or to grant judgment n.o.v. The Supreme Court, in effect, held that the trial judge was right about the evidence, but wrong about his own limitation of power. All that the United States Supreme Court did was to enter the dismissal which the trial judge was willing, but felt that he was unable to order.

III. THE PETITIONER AS THE VERDICT WINNER NOW FINDS HERSELF IN A NOVEL POSITION UNLIKE THAT OF ANY LITIGANT EVER TO APPEAR BEFORE THIS COURT.

The Supreme Court, for the first time, has interpreted the Federal Rules of Civil Procedure as requiring a verdict-winner as appellee to assign grounds for a new trial in the event the appellate court fails to agree with the rulings of the trial court. Until now, no appellee was ever told by this Court that he must assign cross-errors. Under these circumstances, this petitioner prays that the Court revise its Opinion at least to the extent that she be permitted an opportunity to file a motion for new trial.

IV. CONCLUSION.

The petitioner prays that this Petition for Re-Hearing be granted; that the decision entered herein on March 20, 1967, be vacated; that the judgment of the court below be reversed and that the judgment of the trial court be reinstated; or, in the alternative, the petitioner prays that she be permitted an opportunity to file a motion for new trial.

The petitioner also prays for such other and further relief in the alternative as may be appropriate.

Respectfully submitted,

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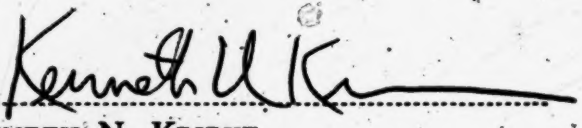
Attorneys for Petitioner

CERTIFICATE OF COUNSEL

I, Kenneth N. Kripke, one of counsel for the above named petitioner, do hereby certify that the foregoing Petition for Re-Hearing is presented in good faith and not for delay.



KENNETH N. KRIPKE,
One of Attorneys for Petitioner

PROOF OF SERVICE

I, Kenneth N. Kripke, one of the attorneys for petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 10th day of April, 1967, I served a copy of the foregoing Petition for Re-Hearing on John C. Mott, Anthony F. Zarlengo, and Joseph S. McCarthy, attorneys for respondent, by mailing copies in duly addressed envelopes with proper postage prepaid, to John C. Mott, Esq., 1020 American National Bank Building, Denver, Colorado 80202; Anthony F. Zarlengo, Esq., 595 Capitol Life Center, Denver, Colorado 80203; and Joseph S. McCarthy, Esq., 745 Washington Building, Washington, D.C. 20005.

KENNETH N. KRIPKE

SUPREME COURT OF THE UNITED STATES

No. 12.—October Term, 1966.

Sandra Lee Neely, etc., Petitioner, *v.* Martin K. Eby Construction Co., Inc.	On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

[March 20, 1967.]

Mr. Justice White delivered the opinion of the Court.

Petitioner brought this diversity action in the United States District Court for the District of Colorado alleging that respondent's negligent construction, maintenance, and supervision of a scaffold platform used in the construction of a missile silo near Elizabeth, Colorado, had proximately caused her father's fatal plunge from the platform during the course of his employment as Night Silo Captain for Sverdrup & Parcel, an engineering firm engaged in the construction of a missile launcher system in the silo. At the close of the petitioner's evidence and again at the close of all the evidence, respondent moved for a directed verdict. The trial judge denied both motions and submitted the case to a jury, which returned a verdict for petitioner for $25,000.

Respondent then moved for judgment notwithstanding the jury's verdict or, in the alternative, for a new trial, in accordance with Rule 50 (b), Federal Rules of Civil Procedure.[1] The trial court denied the motions and

[1] "(*b*) *Motion for Judgment Notwithstanding the Verdict.* Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after the entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment

entered judgment for petitioner on the jury's verdict. Respondent appealed, claiming that its motion for judgment *n. o. v.* should have been granted. Petitioner, as appellee, urged only that the jury's verdict should be upheld.

The Court of Appeals held that the evidence at trial was insufficient to establish either negligence by respondent or proximate cause and reversed the judgment of the District Court "with instructions to dismiss the action." Without filing a petition for rehearing in the Court of Appeals, petitioner then sought a writ of certiorari, presenting the question whether the Court of Appeals could, consistent with the 1963 amendments to Rule 50 of the Federal Rules[2] and with the Seventh

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entered in accordance with his motion for a directed verdict . . . . A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. . . ."

[2] Principally, the amendments added new subsections (c) and (d) to Rule 50:

"(c) *Same: Conditional Rulings on Grant of Motion.*

"(1) If the motion for judgment notwithstanding the verdict, provided for in subdivision (b) of this rule, is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

"(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a

Amendment's guarantee of a right to jury trial, direct the trial court to dismiss the action. Our order allowing certiorari directed the parties' attention to whether Rule 50 (d) and our decisions in *Cone* v. *West Virginia Pulp & Paper Co.*, 330 U. S. 212; *Globe Liquor Co.* v. *San Roman*, 332 U. S. 571; and *Weade* v. *Dichmann, Wright & Pugh, Inc.*, 337 U. S. 801, permit this disposition by a court of appeals despite Rule 50 (c)(2), which gives a party whose jury verdict is set aside by a trial court 10 days in which to invoke the trial court's discretion to order a new trial.[2] We affirm.

Under Rule 50 (b), if a party moves for a directed verdict at the close of the evidence and if the trial judge elects to send the case to the jury, the judge is "deemed" to have reserved decision on the motion. If the jury returns a contrary verdict, the party may within 10 days

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new trial pursuant to Rule 59 not later than 10 days after entry of the judgment notwithstanding the verdict.

"(*d*) *Same: Denial of Motion.* If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted."

[2] Petitioner presented the following question in her petition for a writ of certiorari:

"Do Rules 50 (d) and 38 (a) Federal Rules of Civil Procedure and the Seventh Amendment to the Constitution of the United States preclude the Court of Appeals from instructing the trial court to dismiss an action wherein the trial court denied the defendant's motions for new trial and for judgment notwithstanding the verdict and entered judgment for the plaintiff?"

In view of the question presented by petitioner and our order granting certiorari, we do not consider whether the Court of Appeals correctly held that petitioner's evidence of negligence and proximate cause was insufficient to go to the jury.

move to have judgment entered in accordance with his motion for directed verdict. This procedure is consistent with decisions of this Court rendered prior to the adoption of the Federal Rules in 1938. Compare *Baltimore & Carolina Line, Inc.* v. *Redman*, 295 U. S. 654, with *Slocum* v. *New York Life Ins. Co.*, 228 U. S. 364, and *Aetna Ins. Co.* v. *Kennedy*, 301 U. S. 389. And it is settled that Rule 50 (b) does not violate the Seventh Amendment's guarantee of a jury trial. *Montgomery Ward & Co.* v. *Duncan*, 311 U. S. 243.

The question here is whether the Court of Appeals, after reversing the denial of a defendant's Rule 50 (b) motion for judgment notwithstanding the verdict, may itself order dismissal or direct entry of judgment for defendant. As far as the Seventh Amendment's right to jury trial is concerned, there is no greater restriction on the province of the jury when an appellate court enters judgment *n. o. v.* than when a trial court does; consequently, there is no constitutional bar to an appellate court granting judgment *n. o. v.* See *Baltimore & Carolina Lines, Inc.* v. *Redman*, *supra*. Likewise, the statutory grant of appellate jurisdiction to the courts of appeals is certainly broad enough to include the power to direct entry of judgment *n. o. v.* on appeal. Section 2106 of Title 28 provides that,

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

See *Bryan* v. *United States*, 338 U. S. 552.

This brings us to Federal Rules 50 (c) and 50 (d), which were added to Rule 50 in 1963 to clarify the proper

practice under this Rule. Though Rule 50 (d) is more pertinent to the facts of this case, it is useful to examine these interrelated provisions together. Rule 50 (c) governs the case where a trial court has granted a motion for judgment *n. o. v.* Rule 50 (c)(1) explains that, if the verdict loser has joined a motion for new trial with his motion for judgment *n. o. v.*, the trial judge should rule conditionally on the new trial motion when he grants judgment *n. o. v.* If he conditionally grants a new trial, and if the court of appeals reverses his grant of judgment *n. o. v.*, Rule 50 (c)(1) provides that "the new trial shall proceed unless the appellate court has otherwise ordered." On the other hand, if the trial judge conditionally denies the motion for new trial, and if his grant of judgment *n. o. v.* is reversed on appeal, "subsequent proceedings shall be in accordance with the order of the appellate court." As the Advisory Committee's Note to Rule 50 (c) makes clear, Rule 50 (c)(1) contemplates that the appellate court will review on appeal both the grant of judgment *n. o. v.* and, if necessary, the trial court's conditional disposition of the motion for new trial.[4] This review necessarily includes the power to grant or to deny a new trial in appropriate cases.

Rule 50 (d) is applicable to cases such as this one where the trial court has denied a motion for judgment

[4] The Advisory Committee explains: "If the motion for new trial has been conditionally granted . . . [t]he party against whom the judgment n. o. v. was entered below may, as appellant, besides seeking to overthrow that judgment, also attack the conditional grant of the new trial. And the appellate court, if it reverses the judgment n. o. v., may in an appropriate case also reverse the conditional grant of the new trial and direct that judgment be entered on the verdict." 31 F. R. D. 645. See *Lind* v. *Schenley Ind. Inc.*, 278 F. 2d 79 (C. A. 3d Cir. 1960), cert. denied, 364 U. S. 835; *Moist Cold Refrigerator Co.* v. *Lou Johnson Co.*, 249 F. 2d 246 (C. A. 9th Cir. 1957), cert. denied, 356 U. S. 968; *Bailey* v. *Slentz*, 189 F. 2d 406 (C. A. 10th Cir. 1951). See also *Tribble* v. *Brain*, 279 F. 2d 424 (C. A. 4th Cir. 1960).

n. o. v. Rule 50 (d) expressly preserves to the party who prevailed in the district court the right to urge that the court of appeals grant a new trial should the jury's verdict be set aside on appeal. Rule 50 (d) also emphasizes that "nothing in the rule precludes" the court of appeals "from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted." Quite properly, this Rule recognizes that the appellate court may prefer that the trial judge pass first upon the appellee's new trial suggestion. Nevertheless, consideration of the new trial question "in the first instance" is lodged with the court of appeals. And Rule 50 (d) is permissive in the nature of its direction to the court of appeals: as in Rule 50 (c)(1), there is nothing in Rule 50 (d) indicating that the court of appeals may not direct entry of judgment *n. o. v.* in appropriate cases.

Rule 50 (c)(2), note 2, *supra*, is on its face inapplicable to the situation presented here. That Rule regulates the verdict winner's opportunity to move for a new trial if the *trial court* has granted a Rule 50 (b) motion for judgment *n. o. v.* In this case, the trial court denied judgment *n. o. v.* and respondent appealed. Jurisdiction over the case then passed to the Court of Appeals, and petitioner's right to seek a new trial in the trial court after her jury verdict was set aside became dependent upon the disposition by the Court of Appeals under Rule 50 (d).

As the Advisory Committee explained, these 1963 amendments were not intended to "alter the effects of a jury verdict or the scope of appellate review," as articulated in the prior decisions of this Court. 31 F. R. D. 653. In *Cone* v. *West Virginia Pulp & Paper Co.*, *supra*, the defendant moved for directed verdict, but the trial judge sent the case to the jury. After a jury verdict for the plaintiff, the trial court denied defendant's motion

for a new trial. On appeal, the Court of Appeals reversed and ordered the entry of judgment *n. o. v.* This Court reversed the Court of Appeals on the ground that the defendant had not moved for judgment *n. o. v.* in the trial court, but only for a new trial, and consequently the Court of Appeals was precluded from directing any disposition other than a new trial. See also *Globe Liquor Co.* v. *San Roman, supra.* In *Johnson* v. *New York, N. H. & H. R. R.*, 344 U. S. 48, this Court held that a verdict loser's motion to "set aside" the jury's verdict did not comply with Rule 50 (b)'s requirement of a timely motion for judgment *n. o. v.* and therefore that the Court of Appeals could not direct entry of judgment *n. o. v.* And in *Weade* v. *Dichmann, Wright & Pugh, Inc., supra,* where a proper motion for judgment *n. o. v.* was made and denied in the trial court, we modified a Court of Appeals decision directing entry of judgment *n. o. v.* because there were "suggestions in the complaint and evidence" of an alternative theory of liability which had not been passed upon by the jury and therefore which might justify the grant of a new trial. 337 U. S., at 808–809.

The opinions in the above cases make it clear that an appellate court may not order judgment *n. o. v.* where the verdict loser has failed strictly to comply with the procedural requirements of Rule 50 (b), or where the record reveals a new trial issue which has not been resolved. Part of the Court's concern has been to protect the rights of the party whose jury verdict has been set aside on appeal and who may have valid grounds for a new trial, some or all of which should be passed upon by the district court, rather than the court of appeals, because of the trial judge's first-hand knowledge of witnesses, testimony, and issues—because of his "feel" for the overall case. These are very valid concerns to which the court of appeals should be constantly alert. Where a

defendant moves for *n. o. v.* in the trial court, the plaintiff may present, in connection with that motion or with a separate motion after *n. o. v.* is granted, his grounds for a new trial or voluntary nonsuit. Clearly, where he retains his verdict in the trial court and the defendant appeals, plaintiff should have the opportunity which 50 (d) affords him to press those same or different grounds in the court of appeals. And obviously judgment for defendant-appellant should not be ordered where the plaintiff-appellee urges grounds for a nonsuit or new trial which should more appropriately be addressed to the trial court.

But these considerations do not justify an ironclad rule that the court of appeals should never order dismissal or judgment for defendant when the plaintiff's verdict has been set aside on appeal. Such a rule would not serve the purpose of Rule 50 to speed litigation and to avoid unnecessary retrials. Nor do any of our cases mandate such a rule. Indeed, in *Pence* v. *United States*, 316 U. S. 332, we affirmed a Court of Appeals decision reversing the trial court's failure to grant judgment *n. o. v.* And in *New York, New Haven & Hartford R. R.* v. *Henagan*, 364 U. S. 441, this Court itself directed entry of judgment for a verdict loser whose proper request for judgment *n. o. v.* had been wrongly denied by the District Court and by the Court of Appeals.[5] In view of these

[5] Since the decision in *Cone* v. *West Virginia Pulp & Paper Co.*, six Courts of Appeals have reversed the denial of a Rule 50 (b) motion and directed entry of judgment *n. o. v.* in addition to the Tenth Circuit's decision in this case. See, *e. g.*, *Capital Transit Co.* v. *Gamble*, 169 F. 2d 283 (C. A. D. C. Cir.); *Stopper* v. *Manhattan Life Ins. Co.*, 241 F. 2d 465 (C. A. 3d Cir.), cert. denied, 355 U. S. 815; *Richmond Television Corp.* v. *United States*, 354 F. 2d 410 (C. A. 4th Cir.), vacated and remanded on other grounds, 382 U. S. 68; *Mills* v. *Mitsubishi Shipping Co.*, 358 F. 2d 609 (C. A. 5th Cir.); *Lappin* v. *Baltimore & Ohio R. Co.*, 337 F. 2d 399 (C. A. 7th Cir.);

cases, the language of Rule 50 (d), and the statutory grant of broad appellate jurisdiction, we think a more discriminating approach is preferable to the inflexible rule for which the petitioner contends.

There are, on the one hand, situations where the defendant's grounds for setting aside the jury's verdict raise questions of subject matter jurisdiction or dispositive issues of law which, if resolved in defendant's favor, must necessarily terminate the litigation. The court of appeals may hold in an employer's suit against a union, for example, that the case is within the exclusive jurisdiction of the National Labor Relations Board, or in a libel suit, that the defendant was absolutely privileged to publish the disputed statement. In such situations, and others like them, there can be no reason whatsoever to prevent the court of appeals from ordering dismissal of the action or the entry of judgment for the defendant.

On the other hand, where the court of appeals sets aside the jury's verdict because the evidence was insufficient to send the case to the jury, it is not so clear that the litigation should be terminated. Although many of the plaintiff-appellee's possible grounds for a new trial, such as inadequacy of the verdict, will not survive a decision that the case should not have gone to the jury in the first place, there remain important considerations which may entitle him to a new trial. The erroneous exclusion of evidence which would have strengthened his case is an important possibility. An-

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Massachusetts Mut. Life Ins. Co. v. *Pistoles*, 160 F. 2d 668 (C. A. 9th Cir.). The other Circuits had rendered similar decisions prior to *Cone*. See *Ferro Concrete Constr. Co.* v. *United States*, 112 F. 2d 488 (C. A. 1st Cir.), cert. denied, 311 U. S. 697; *Brennan* v. *Baltimore & Ohio R. Co.*, 115 F. 2d 555 (C. A. 2d Cir.), cert. denied, 312 U. S. 685; *Connecticut Mut. Life Ins. Co.* v. *Lanahan*, 113 F. 2d 935, modifying 112 F. 2d 375 (C. A. 6th Cir.); *Federal Sav. & Loan Ins. Corp.* v. *Kearney Trust Co.*, 151 F. 2d 720 (C. A. 8th Cir.).

other is that the trial court itself caused the insufficiency in plaintiff-appellee's case by erroneously placing too high a burden of proof on him at trial. But issues like these are issues of law with which the courts of appeals regularly and characteristically must deal. The district court in all likelihood has already ruled on these questions in the course of the trial and, in any event, has no special advantage or competence in dealing with them. They are precisely the kind of issues that the losing defendant below may bring to the court of appeals without ever moving for a new trial in the District Court. Cf. *Globe Liquor Co.* v. *San Roman*, 332 U. S. 571, 574. Likewise, if the plaintiff's verdict is set aside by the trial court on defendant's *n. o. v.* motion, plaintiff may bring these very grounds directly to the court of appeals without moving for a new trial in the district court.[6] Final action on these issues normally rests with the court of appeals.

A plaintiff whose jury verdict is set aside by the trial court on defendant's *n. o. v.* motion may ask the trial judge to grant a voluntary nonsuit to give plaintiff another chance to fill a gap in his proof. *Cone* v. *West Virginia Pulp & Paper Co.*, 330 U. S., at 217. The plaintiff-appellee should have this same opportunity when his verdict is set aside on appeal. Undoubtedly, in many cases this question will call for an exercise of the trial court's discretion. However, there is no substantial reason why the appellee should not present the matter to the court of appeals, which can if necessary

[6] The Advisory Committee's Note to Rule 50 (c)(2) explains: "Even if the verdict-winner makes no motion for a new trial, he is entitled upon his appeal from the judgment n. o. v. not only to urge that that judgment should be reversed and judgment entered upon the verdict, but that errors were committed during the trial which at the least entitle him to a new trial." 31 F. R. D. 646.

remand the case to permit initial consideration by the district court.

In these cases where the challenge of the defendant-appellant is to the sufficiency of the evidence, the record in the court of appeals will very likely be a full one. Thus, the appellee will not be required to designate and print additional parts of the record to substantiate his grounds for a nonsuit (or a new trial), and it should not be an undue burden in the course of arguing for his verdict to indicate in his brief why he is entitled to a new trial should his judgment be set aside. Moreover, the appellee can choose for his own convenience when to make his case for a new trial: he may bring his grounds for new trial to the trial judge's attention when defendant first makes an *n. o. v.* motion, he may argue this question in his appellee's brief to the court of appeals, or he may in suitable situations seek rehearing from the court of appeals after his judgment has been reversed.

In our view, therefore, Rule 50 (d) makes express and adequate provision for the opportunity—which the plaintiff-appellee had without this rule—to present his grounds for a new trial in the event his verdict is set aside by the court of appeals. If he does so in his brief—or in a petition for rehearing if the court of appeals has directed entry of judgment for appellant—the court of appeals may make final disposition of the issues presented, except those which in its informed discretion should be reserved for the trial court. If appellee presents no new trial issues in his brief or in a petition for rehearing, the court of appeals may, in any event, order a new trial on its own motion or refer the question to the district court, based on factors encountered in its own review of the case. Compare *Weade* v. *Dichmann, Wright & Pugh, Inc., supra.*

In the case before us, petitioner won a verdict in the District Court which survived respondent's *n. o. v.* motion. In the Court of Appeals the issue was the sufficiency of the evidence and that court set aside the verdict. Petitioner, as appellee, suggested no grounds for a new trial in the event her judgment was reversed, nor did she petition for rehearing in the Court of Appeals, even though that court had directed a dismissal of her case. Neither was it suggested that the record was insufficient to present any new trial issues or that any other reason required a remand to the District Court. Indeed, in her brief in the Court of Appeals, petitioner stated, "this law suit was fairly tried and the jury was properly instructed." It was, of course, incumbent on the Court of Appeals to consider the new trial question in the light of its own experience with the case. But we will not assume that the court ignored its duty in this respect, although it would have been better had its opinion expressly dealt with the new trial question.

In a short passage at the end of her brief to this Court, petitioner suggested that she has a valid ground for a new trial in the District Court's exclusion of opinion testimony by her witnesses concerning whether respondent's scaffold platform was adequate for the job it was intended to perform. This matter was not raised in the Court of Appeals or in the petition for a writ of certiorari, even though the relevant portions of the transcript were made a part of the record on appeal. Under these circumstances, we see no cause for deviating from our normal policy of not considering issues which have not been presented to the Court of Appeals and which are not properly presented for review here. Supreme Court Rule 40 (1)(d)(2). See *J. I. Case Co.* v. *Borak*, 377 U. S. 426, 428–429; *California* v. *Taylor*, 353 U. S. 553, 556–557, n. 2.

Petitioner's case in this Court is pitched on the total lack of power in the Court of Appeals to direct entry of judgment for respondent. We have rejected that argument and therefore affirm.

It is so ordered.

MR. JUSTICE DOUGLAS and MR. JUSTICE FORTAS, while agreeing with the Court's construction of Rule 50, would reverse the judgment because in their view the evidence of negligence and proximate cause was sufficient to go to the jury.

SUPREME COURT OF THE UNITED STATES

No. 12.—October Term, 1966.

Sandra Lee Neely, etc., Petitioner, *v.* Martin K. Eby Construction Co., Inc.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

[March 20, 1967.]

Mr. Justice Black, dissenting.

I dissent from the Court's decision in this case for three reasons: First, I think the evidence in this case was clearly sufficient to go to the jury on the issues of both negligence and proximate cause. Second, I think that under our prior decisions and Rule 50, a court of appeals, in reversing a trial court's refusal to enter judgment *n. o. v.* on the ground of insufficiency of the evidence, is entirely powerless to order the trial court to dismiss the case, thus depriving the verdict winner of any opportunity to present a motion for new trial to the trial judge who is thoroughly familiar with the case. Third, even if a court of appeals has that power, I find it manifestly unfair to affirm the Court of Appeals' judgment here without giving this petitioner a chance to present her grounds for a new trial to the Court of Appeals as the Court today for the first time holds she must.

I.

Petitioner and respondent, both in their briefs on the merits and in their oral argument, have vigorously and extensively addressed themselves to the question of whether the lower court was correct in holding that petitioner's evidence of negligence and proximate cause was insufficient to go to the jury. The Court, however, con-

veniently avoids facing this issue—which if resolved in petitioner's favor, would completely dispose of this case[1]—by a footnote statement that this issue was not presented in the petition for certiorari nor encompassed by our order granting certiorari. Besides the fact that this seems to me to be an overly meticulous reading of the petition for certiorari and our order granting it,[2] I see no reason for the Court's refusal to deal with an issue which is undoubtedly present in this case even though not specifically emphasized in the petition for certiorari. Although usually this Court will not consider questions not presented in the petition for certiorari, our Rule 40 (1)d(2) has long provided that "the court, at its option, may notice a plain error not presented," and the Court has frequently disposed of cases by deciding

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[1] Heretofore, when faced with this issue, the Court has met it head-on and thus avoided unnecessarily discussing the effect of Rule 50. See, *e. g.*, *Conway* v. *O'Brien*, 312 U. S. 492; *Berry* v. *United States*, 312 U. S. 450; *Halliday* v. *United States*, 315 U. S. 94.

[2] Petitioner's "Question Presented," as set out in note 3 of the Court's opinion, is whether—in addition to Rule 50 (d)—Rule 38 (a) and the Seventh Amendment "preclude the Court of Appeals from instructing the trial court to dismiss an action wherein the trial court denied the defendant's motions for new trial and judgment notwithstanding the verdict and entered judgment for the plaintiff?" Certainly, if there were sufficient evidence to go to the jury, then Rule 38 (a) and the Seventh Amendment preclude the Court of Appeals from directing a dismissal of petitioner's case after she had obtained a jury verdict. To make it further clear that petitioner was challenging the Court of Appeals' ruling on the sufficiency of the evidence, the petition for certiorari also states that "petitioner does not concede for one moment that the trial court and the jury were wrong and that the appellate court was right in interpreting the evidence as to proximate cause and negligence." And our order granting certiorari, while directing counsel's attention to the question of the Court of Appeals' power to dismiss the case under Rule 50 (c) and (d), stated that this question was "in addition to all the questions presented by the petition." 382 U. S. 914.

crucial issues which the parties themselves failed to present. See, *e. g.*, *Brotherhood of Carpenters* v. *United States*, 330 U. S. 395; *Silber* v. *United States*, 370 U. S. 717; *Boynton* v. *Virginia*, 364 U. S. 454. If, as I believe, the Court of Appeals was wrong in concluding that the evidence was insufficient to go to the jury, then its reversal of the jury's verdict was a violation of the Seventh Amendment, and certainly this is the kind of plain constitutional error that this Court can and should correct.

That the evidence was more than ample to prove both negligence and proximate cause is, I think, inescapably clear from even a cursory review of the undisputed facts in this record. Petitioner's father was killed while working on the construction of a missile-launching silo in Colorado. Neely worked for an engineering firm and his job was to work on certain concrete blocks suspended 130 feet from the bottom of the silo. Respondent, a carpentry firm responsible for the construction, maintenance, and supervision of all scaffolding in the silo, constructed a wooden platform between two of the concrete blocks in order to allow workers such as Neely to go from one block to the other. The platform, however, did not cover the entire distance between the blocks nor was it level with them. Instead, it was two feet horizontally away from either block and was raised two feet vertically above the blocks. Also, a railing was constructed on one side of the platform between it and one of the blocks. No railing was placed on the other side of the platform. When Neely along with three fellow workers arrived at the silo, they were told by respondent's foreman that the platform was ready. The only way they could get from the platform to the blocks was by jumping the gap between the platform and blocks. However, because of the railing on one side of the platform, the workers could not jump directly across the two-foot gap to the block on that side,

but had either to jump three feet diagonally to the block or to climb over the railing. One worker successfully leaped to the block, fastened his safety belt, and then looked back and saw Neely, who was to follow, falling head first through the hole between the platform and the block. Neely, failing to make the jump, fell to his death 130 feet below.

Petitioner's case consisted of the testimony of the day foreman, one of the carpenters who constructed the platform, and the worker who was closest to Neely when he fell. Quite understandably, in view of the strong evidence, petitioner did not call to testify the two other workers who witnessed Neely's fall or the other carpenters who worked on the platform. She did, however, introduce several revealing photographs of the platform, blocks, and intervening gap taken immediately after the accident. On respondent's objection, the trial judge excluded several other photographs which showed nets which, after the accident, were placed under the platform for the safety of the investigators. There was testimony that neither the railing nor platform broke and that there was no grease on the platform. But when petitioner's counsel asked the day foreman whether he considered the platform safe and adequate, he replied in the negative, though this testimony, on respondent's objection, was then ordered stricken as opinion evidence on an ultimate issue. The trial court refused to allow the same question to be asked of the other witnesses. At one time, the carpenter did testify that a railing was put on only one side of the platform because lunch hour was nearing and the platform had to be completed before then.

On this evidence, which the trial judge characterized as presenting a "close case," the Court of Appeals held a verdict should have been directed for respondent. Although the court was willing to assume that there might be some negligence in the size of the platform or

the placing of the railing along one side, and though it was willing to concede "that the platform might possibly have had something to do with his [Neely's] fall," 344 F. 2d 482, 486, the court purported to find no evidence, not even circumstantial evidence, that the construction of the platform was the proximate cause of the fall. I think this holding cries for reversal. If constructing a platform, 130 feet in the air at which height workmen use safety belts, with a three-foot gap over which workers must leap and with a railing which makes a direct jump impossible, does not itself show negligence and proximate cause, then it is difficult to conceive of any evidence that would. Besides the size of the platform and the presence of the railing, the photographs shown to the jury, and reproduced in this record, reveal other possible defects in its construction: a vertical kickboard extending beyond the railing into the gap through which Neely jumped; rough boards on the floor of the platform. The fact that Neely was coming head-first by the time he passed the block two feet below might have made it reasonable for the jury to have concluded that he tripped on these impediments rather than merely stepped in the opening. In short, I believe it was a clear violation of the Seventh Amendment to deprive petitioner of a jury verdict rendered on this evidence.

II.

Since the adoption of Rule 50, our cases have consistently and emphatically preserved the right of a litigant whose judgment—whether it be a judgment entered on the verdict or judgment *n. o. v.*—is set aside to invoke the discretion of the trial court in ruling on a motion for new trial. The first of these cases was *Montgomery Ward & Co.* v. *Duncan*, 311 U. S. 243, where the trial judge, unlike here, granted the defendant's motion for judgment *n. o. v.*, but in doing so failed to rule on his alternative motion for a new trial. The Court of

Appeals reversed the trial court's grant of judgment *n. o. v.* to the defendant and remanded the case with directions to enter judgment on the verdict for the plaintiff, overruling defendant's contention that the trial judge should be given an opportunity to pass on his alternative motion for new trial. Holding that the trial judge should have initially ruled on this alternative motion, this Court remanded the case to the trial judge for the purpose of passing on that motion. In explaining this result the Court said:

> "The rule contemplates that either party to the action is entitled to the trial judge's decision on both motions, if both are presented . . . . If, however, as in the present instance, the trial court erred in granting the motion, the party against whom the verdict went, is entitled to have his motion for a new trial considered in respect of asserted substantial trial errors and matters appealing to the discretion of the judge." *Id.*, at 251–252.

The question here, however, unlike that in *Duncan*, is whether the Court of Appeals, after holding that the District Court erred in failing to direct a verdict against the plaintiff, can then order the District Court to dismiss the case and thereby deprive the verdict winner of any opportunity to ask the trial judge for a new trial in order to cure a defect in proof in the first trial. This question was first considered in *Cone* v. *West Virginia Pulp & Paper Co.*, 330 U. S. 212. In *Cone*, as in this case, the question was whether the Court of Appeals could direct the dismissal of a case in which the trial court had erroneously failed to grant a directed verdict. In that case no motion for judgment *n. o. v.* had been made by the verdict loser. We held that the Court of Appeals could not under those circumstances order the dismissal of the case. Noting that "[d]etermination of whether a new trial should be granted or a judgment entered under

Rule 50 (b) calls for the judgment in the *first instance* of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart," *id.*, at 216 (emphasis added), we held that "a litigant should not have his right to a new trial *foreclosed* without having had the benefit of the trial court's judgment on the question," *id.*, at 217 (emphasis added). We clearly indicated that the result would have been the same had the verdict loser, as did the respondent here, unsuccessfully moved for a judgment *n. o. v.* in the trial court, for in that case, likewise, the verdict winner would have had to wait until the Court of Appeals deprived him of his verdict before presenting his grounds for a new trial. We specifically rejected a suggestion—today accepted by the Court—that the verdict winner should have to claim his right to a new trial in the Court of Appeals or lose it. *Id.*, at 218.

Following *Cone*, we emphasized and re-emphasized in *Globe Liquor Co.* v. *San Roman*, 332 U. S. 571, that the reason why courts of appeals are without power to dismiss cases in situations like this is that the power to determine this issue is vested exclusively in the judge who tried the case. And again, in *Weade* v. *Dichmann, Wright & Pugh, Inc.*, 337 U. S. 801, even where—as in this case—a timely motion for judgment *n. o. v.* had been made, the Court affirmed the Court of Appeals' holding that the verdict could not stand, but, relying on *Cone* and *Globe Liquor*, modified its judgment to provide the trial judge with an opportunity to decide whether the verdict winner was entitled to a new trial. *Id.*, at 809 and n. 8. See also *Johnson* v. *New York, N. H. & H. R. Co.*, 344 U. S. 48; *Fountain* v. *Filson*, 336 U. S. 681.

This issue of whether a new trial is justified after a verdict is set aside either by a trial or an appellate court is a new issue which it was not necessary to decide in the original trial. It is a factual issue and that the trial

court is the more appropriate tribunal to determine it has been almost universally accepted by both federal and state courts throughout the years. There are many reasons for this. Appellate tribunals are not equipped to try factual issues as trial courts are. A trial judge who has heard the evidence in the original case has a vast store of information and knowledge about it that the appellate court cannot get from a cold, printed record. Thus, as we said in *Cone*, the trial judge can base the broad discretion granted him in determining factual issues of a new trial on his own knowledge of the evidence and the issues "in a perspective peculiarly available to him alone." 330 U. S., at 216. The special suitability of having a trial judge decide the issue of a new trial in cases like this is emphasized by a long and unbroken line of decisions of this Court holding that the exercise of discretion by trial judges in granting or refusing new trials on factual grounds is practically unreviewable by appellate courts. See, *e. g.*, *Fairmont Glass Works* v. *Cub Fork Coal Co.*, 287 U. S. 474, 481–482; cited with approval in *Montgomery Ward & Co.* v. *Duncan*, *supra*, at 253, n. 12.

Today's decision is out of harmony with all the cases referred to above. The Court's opinion attempts to justify its grant of power to appellate courts by pointing to instances in which those courts, and even assertedly this Court, have utilized this power in the past. The Court cites *Pence* v. *United States*, 316 U. S. 332, and *New York, N. H. & H. R. Co.* v. *Henagan*, 364 U. S. 441, as such instances. In *Pence*, the Court of Appeals reversed the trial court's refusal to grant judgment *n. o. v.* and remanded for further consistent proceedings. We affirmed without the slightest indication that we felt the Court of Appeals' mandate deprived the verdict winner of the chance to move for a new trial on remand. Neither did the Court indicate that this would be the effect of its

mandate in *Henagan* where it remanded the case to the District Court to enter judgment *n. o. v.* for the verdict loser. And the same can be said of almost every other post-*Cone* court of appeals decision cited by the Court in note 5. Cf. *Johnson* v. *New York, N. H. & H. R. Co.*, *supra*, at 54, n. 3.

The Court also attempts to justify its new grant of power to appellate judges by a strained process of reasoning. First, the Court suggests that the power of an appellate court to dismiss a case after setting aside a litigant's verdict can be derived from 28 U. S. C. § 2106. This idea, of course, was first suggested by a dissent in *Johnson* v. *New York, N. H. & H. R. Co.*, *supra*, at 65, which argued that because of § 2106 "the discretion now rest with the court of appeals to grant a new trial or to direct a verdict according to law on the record already made." This contention, however, was not deemed worthy of argument or comment either by the Court in its opinion or by others who dissented in the *Johnson* case. Section 2106 merely deals with the general power of appellate courts and indicates no congressional purpose to overcome the long-standing and established practice, recognized by this Court's decisions and Rule 50, that the discretion to decide whether a new trial should be granted, when the appellate court finds a gap in the supporting evidence, rests with the trial judge and not with the appellate court. It begs the question to argue that it is appropriate for an appellate court in such circumstances to order a dismissal merely because § 2106 provides that a court of appeals may direct the entry of an "appropriate judgment."

The Court further purports to derive this power from the provisions of Rule 50 (c) and (d). The Court notes that under Rule 50 (c)(1), where the trial judge grants a judgment *n. o. v.* and either grants or denies the conditional motion for new trial, an appellate court in revers-

ing the judgment *n. o. v.* has "the power to grant or to deny a new trial in appropriate cases." But, as the Court fails to recognize, the crucial prerequisite to the exercise of this appellate power is a ruling in the first instance, as required in *Cone*, by the trial court on the motion for new trial. Here that crucial prerequisite is missing.

The Court then proceeds to find Rule 50 (c)(2) inapplicable on its face to a situation where the trial court denies a judgment *n. o. v.* but an appellate court orders that one be entered. In doing so, the Court ignores the purpose of Rule 50 (c)(2). The Rules Committee explained this provision as follows:

> "Subdivision (c) (2) is a reminder that the verdict-winner is entitled, even after entry of judgment n. o. v. against him, to move for a new trial in the usual course."

The rule does not remotely indicate that the verdict winner loses this right to move for a new trial if the trial court's entry of judgment *n. o. v.* against him is on direction by the appellate court rather than on its own initiative. Sections (c) and (d) were added to Rule 50 in 1963, after all the cases discussed above had been decided. As the Notes of the Rules Committee indicate, these amendments were made to implement those decisions which had emphasized the importance of having trial judges initially determine the factual issue of whether a new trial is justified in cases where judgment *n. o. v.* has been entered against the verdict winner, either by the trial or appellate court. The Committee at no place hinted that the amendments were meant to change the practice established by those cases, and to the contrary, it specifically stated that, "The amendments do not alter the effects of a jury verdict *or the scope of appellate review.*" (Emphasis added.)

Certainly this is true of Rule 50 (d). This section provides that the verdict winner, who prevailed on the motion for judgment *n. o. v.*, "*may*, as appellee assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict" and that "nothing in this rule precludes it [the appellate court] from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted." Because the Court finds that the rule "is permissive in the nature of its direction to the court of appeals," it concludes "there is nothing in Rule 50 (d) indicating an intent to deny the court of appeals power to direct entry of judgment *n. o. v.* in appropriate cases." The Court entirely overlooks the fact that the rule is likewise permissive in the nature of its direction to the verdict winner as appellee: it provides that the verdict winner "may" ask the Court of Appeals for a new trial; it does not provide that he must do so in order to protect his right to a new trial. Contrary to the Court, I think the express failure of Rule 50 (d) to give the appellate court power to order a case dismissed indicates a clear intention to deny it any such power. The practice now permitted by Rule 50 (d) was first embodied in the Notes of the Rules Committee to the proposed, but unadopted, amendments of 1946. The Notes suggested that a verdict winner could, as appellee, assign grounds for a new trial in the event the appellate court set aside his verdict. In *Cone*, however, we expressly rejected the contention that the verdict winner's failure, as appellee, to assign grounds for a new trial in the appellate court gave that court the power to deny him a new trial. *Cone* v. *West Virginia Pulp & Paper Co.*, *supra*, at 218 and n. 6. This rejection was extensively discussed by the commentators, most of whom concluded that under *Cone* the verdict winner

should be allowed a chance to present his motion for new trial at the trial court level.[3] Finally, when Rule 50 (d) was adopted, there was not the slightest indication that it was intended to adopt the practice that we found objectionable in *Cone*. In fact, it was carefully worded to avoid giving the appellate court any power to *deny* a new trial. I do not believe this omission unintentional, for the language of Rule 50 (c)(1), adopted at the same time, does purport to give the appellate court this power when it reverses a judgment *n. o. v.* and the trial court has already denied the verdict loser's conditional motion for new trial. It does so clearly by providing that "subsequent proceedings shall be in accordance with the order of the appellate court."

In short, today's decision flies in the teeth of Rule 50 (c)(2), and our cases which that section was intended to implement, by giving the Court of Appeals the power, clearly withheld by Rule 50 (d), to substitute its judgment for the trial court's and then decide that justice requires no new trial.

III.

Even were I to agree with the Court that courts of appeals have the power to deny a verdict winner a new trial, I could not agree to the affirmance of such a denial here. Here, so far as appears from the record, the Court of Appeals never even gave a thought to the question of whether petitioner was entitled to a new trial, but simply required that the district judge dismiss the lawsuit as though it were an automatic necessity. And petitioner, in seeking to support her verdict without directing the Court of Appeals' attention to any grounds for a new trial, had every right to rely on our past cases which plainly told her that she was entitled to make her motion

[3] See, *e. g.*, Note, 51 Nw. U. L. Rev. 397, 400–402 (1956); Note, 58 Col. L. Rev. 517, 524–525 (1958).

for a new trial to the trial judge who is far more able to determine whether justice requires a new trial. While in one breath the Court says that it "will not assume that the court [of appeals] ignored its duty" to "consider the new trial question," in another breath it notes that "this matter was not raised in the Court of Appeals." And because petitioner failed to present grounds for a new trial to the Court of Appeals, the Court, while recognizing that she here presents grounds for a new trial which might require decision by the trial court, refuses to consider these grounds.

In refusing to consider petitioner's grounds for a new trial, the Court completely ignores what was done in *Weade* v. *Dichmann, Wright & Pugh, Inc., supra.* There we ordered the case remanded to the trial court to pass on petitioner's motion for new trial because petitioner suggested to this Court that there was an alternative theory presented by the complaint and evidence. However, nowhere in the record in that case was it indicated that petitioner had argued this alternative theory in the Court of Appeals, and nothing in our opinion indicates any such requirement. The Court correctly summarizes *Weade* as holding that "an appellate court may not order judgment *n. o. v.* where . . . *the record reveals a new trial issue which has not been resolved.*" (Emphasis added.) I think the record here reveals such an issue and that, at the very least, petitioner should now be given a chance to argue that issue to the Court of Appeals.

The record here clearly reveals that there were gaps in petitioner's case which she might, if given a chance, fill upon a new trial. First, only one of the three eyewitnesses to Neely's fall and only one of the carpenters who worked on the platform were called as witnesses. Second, the trial court excluded testimony by all the witnesses as to their opinions of the adequacy of the platform. Third, several of Neely's very relevant photo-

graphs of the platform were excluded by the trial judge. From such circumstances as these the trial judge might properly have concluded that petitioner was entitled to a new trial to fill the gaps in her case. It is particularly pertinent in this respect that the Court of Appeals itself said:

> "It may, of course, be conceded that the platform might possibly have had something to do with this fall, but there is nothing in the record to show what it was." 344 F. 2d, at 486.

It surely cannot be dismissed as idle conjecture to think that petitioner could, if given a chance, introduce sufficient evidence to prove to the most exacting fact finder that the three-foot gap in the platform 130 feet above the ground had something to do with this fall and this death.